

## Missouri Attorney General's Opinions - 1987

Opinion	Date	Topic	Summary
<a href="#">8-87</a>	Feb 13		Opinion letter to Richard C. Rice
<a href="#">11-87</a>	Feb 13		Opinion letter to W. James Icenogle
<a href="#">12-87</a>	Feb 13		Opinion letter to Paul S. McNeill, Jr.
<a href="#">13-87</a>	Jan 27	ATTORNEYS. BI-STATE DEVELOPMENT AGENCY. CONFLICT OF INTEREST. INCOMPATIBILITY OF OFFICES. LEGISLATORS.	An attorney who is also a member of the General Assembly of the State of Missouri may not render legal services to the Bi-State Development Agency of the Missouri-Illinois Metropolitan District because such would constitute "employment under ... any municipality" of the State of Missouri and would be prohibited by Article III, Section 12, Missouri Constitution.
<a href="#">14-87</a>	Jan 22		Opinion letter to The Honorable Merrill Townley
<a href="#">15-87</a>	Feb 13	PORT AUTHORITY. PROPERTY.	A regional port authority under Chapter 68, RSMo 1986, does have the authority to purchase real property outside of its designated boundaries, including property in an adjoining state, as long as it is necessary to fulfill the purposes of the port authority.
<a href="#">16-87</a>	Mar 19		Opinion letter to Ronald R. Holliday
<a href="#">17-87</a>	Mar 11		Opinion letter to Vic Downing
<a href="#">18-87</a>	Mar 19		Opinion letter to Richard C. Rice
<a href="#">19-87</a>	Mar 19		Opinion letter to Lewis R. Crist
<a href="#">20-87</a>	June 4		Opinion letter to Jerry M. Hunter
<a href="#">21-87</a>	Mar 19		Opinion letter to The Honorable Marion Cairns
<a href="#">22-87</a>	Jan 27		Opinion letter to The Honorable Bob F. Griffin
<a href="#">25-87</a>	Apr 6		Opinion letter to Gary E. Stevenson
<a href="#">26-87</a>	Feb 3		Opinion letter to The Honorable Frank Bild
<a href="#">27-87</a>	Dec 29	AREA AGENCIES ON AGING. DIVISION OF AGING. SOCIAL SERVICES, DEPARTMENT OF.	An area agency on aging which is a not-for-profit corporation incorporated under Chapter 355, RSMo, comes within the provisions of Sections 610.010 through 610.030, RSMo, the Sunshine Law, because it is a "public governmental body" as defined in Section 610.010(2), RSMo Supp.1987.

		SUNSHINE LAW.	
<a href="#">30-87</a>	Mar 19		Opinion letter to Richard C. Rice
<a href="#">32-87</a>	Apr 6		Opinion letter to The Honorable Steve Danner
<a href="#">35-87</a>	Mar 19	COUNTY HIGHWAY COMMISSION- DEPARTMENT. COUNTY ROADS. ROADS AND BRIDGES.	The provisions of Sections 230.235 and 230.240, RSMo 1986, are required to be implemented by third class counties which have adopted the alternative form of county highway commission.
<a href="#">36-87</a>	Feb 24	MILITARY SERVICE. STATE EMPLOYEES. STATE EMPLOYEES' RETIREMENT SYSTEM.	When purchasing creditable prior service as a state employee for military service, the amount of payment computed is to bear interest at least from the date that the employee was employed by the state after leaving military service and, if the employee does not pay the required amount at the time of filing his election to purchase credit with the retirement system, the employee is to pay interest upon any unpaid balance.
<a href="#">40-87</a>	July 13		Opinion letter to The Honorable John F. Bass
<a href="#">41-87</a>	Apr 23		Opinion letter to Richard C. Rice
<a href="#">44-87</a>	Oct 2		Opinion letter to Thomas M. Johnson
<a href="#">46-87</a>	Oct 30		Opinion letter to The Honorable Neil Molloy
<a href="#">48-87</a>	Aug 25		Opinion letter to The Honorable Roy Cagle
<a href="#">49-87</a>	Mar 23	TAXATION-PROPERTY. TAXATION-RATE. TAXATION-SCHOOLS. REASSESSMENT.	(1) Political subdivisions may revise their property tax rates upward to the extent permitted by statute without a vote of the people, subject to limitations discussed herein;  (2) changes in assessed valuation constituting a general reassessment as defined in Section 137.073, RSMo 1986, are to be considered a general reassessment even if the changes are the result of implementing a biennial maintenance plan;  (3) school districts can adjust their Proposition C rollback pursuant to Section 164.013, RSMo 1986, as discussed herein; and (4) to the extent there is a conflict between Section 137.115, RSMo 1986, and Section 137.073, RSMo 1986, in adjusting tax rates, the provisions of Section 137.115, RSMo 1986, apply. We do not opine on whether the maximum tax rate calculated in 1985 under Article X, Section 22 of the Missouri Constitution can be exceeded in 1987 without a vote of the people.
<a href="#">51-87</a>	June 4		Opinion letter to The Honorable W. O. 'Bob' Howard

<a href="#">52-87</a>	Sept 4		Opinion letter to The Honorable Edward E. Quick
<a href="#">55-87</a>	June 4	COUNTIES. COUNTY COMMISSIONS. COUNTY COURTHOUSE. COUNTY OFFICES.	The county commission in a third class county has the authority under Section 49.265, RSMo 1986, to require all county offices, except the sheriff's office, to be open five and one-half days each week; therefore, such county commission has the authority to require county offices, except the sheriff's office, to be open Saturday mornings after being open Monday through Friday during regular working hours. The county commission may require any office to be open six days a week when the public convenience so requires.
<a href="#">58-87</a>	Apr 28		Opinion letter to The Honorable Phil B. Curls
<a href="#">59-87</a>	June 4		Opinion letter to Timothy W. Perigo
<a href="#">61-87</a>	Apr 28	CITIES, TOWNS & VILLAGES. CONSTITUTION. CONSTITUTIONAL LAW. FREEHOLDERS. SAINT LOUIS CITY.	<p>1. A board of freeholders organized under Article VI, Section 30(a), Missouri Constitution (as amended 1966) has the power to propose for a vote by the qualified electors of the City of St. Louis and St. Louis County a plan involving the disincorporation of existing municipalities and the incorporation of new municipalities provided the changes affect all or part of both the City of St. Louis and St. Louis County.</p> <p>2. The people of the City of St. Louis and St. Louis County do not have the power under Article VI, Section 30(a) to enact a plan which consolidates municipalities in St. Louis County without providing for changes in all or part of the City of St. Louis.</p> <p>3. The language in Article VI, Section 30(a) which provides "to establish a metropolitan district or districts for the functional administration of services common to the area included therein" does not authorize the board of freeholders to consolidate existing municipalities and incorporate new municipalities.</p>
63-87			Withdrawn
<a href="#">64-87</a>	Mar 10		Opinion letter to Carl M. Koupal, Jr.
<a href="#">65-87</a>	June 4	COUNTIES. COUNTY EXTENSION. COUNTY TAXES. ELECTIONS. PROPERTY TAX.	The Monroe County Commission is without authority to submit at referendum the proposition of levying and collecting a special tax for the benefit of the county agricultural extension program.
<a href="#">66-87</a>	Nov 10	CITIES, TOWNS AND VILLAGES. CITY ANNEXATION. FOURTH CLASS CITIES.	Section 71.012 and Section 71.014, RSMo 1986, provide alternative methods of annexation. A city of the fourth class in St. Charles County has the option of proceeding under either of these sections.

<a href="#">67-87</a>	July 31	COLLEGES. SUNSHINE LAW. STATE COLLEGES.	While the Student Government Association of Southwest Missouri State University is not normally a "public governmental body" as defined in Section 610.010(2), RSMo 1986, the provisions of Sections 610.010 to 610.030, RSMo 1986, applicable to "public governmental bodies" may become applicable to the Student Government Association when it participates by way of delegation from the Board of Regents in decisional authority beyond the perimeters of policies, rules and regulations previously formulated and promulgated by the Board of Regents or when the Student Government Association exercises de facto authority tacitly approved or summarily accepted by the Board of Regents.
<a href="#">71-87</a>	Sept 4	ASSESSORS. LAND SURVEYORS. STATE TAX COMMISSION.	The Missouri State Tax Commission and county assessors can engage in cadastral mapping to the extent necessary to perform their duties under the law without being registered as land surveyors in Missouri.
<a href="#">72-87</a>	Oct 2		Opinion letter to The Honorable Glenn H. Binger
<a href="#">74-87</a>	Oct 5	STATE AUDITOR. DEPARTMENT OF MENTAL HEALTH.	<p>1. The State Auditor is not permitted to conduct performance audits of the Department of Mental Health and its facilities, but may postaudit the financial condition of the Department and its facilities.</p> <p>2. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to the following records of the Department of Mental Health in its audit examination of the Department and its facilities: A. Patient medical records, except drug and alcohol abuse records subject to federal confidentiality regulations; B. Physician peer review minutes or records where review of patient care was the subject of the meeting; C. Abuse and neglect investigation reports; D. Records of patient death cases.</p> <p>3. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to records relating to litigation pending against the Department of Mental Health in its audit examination of the Department and its facilities. However, where the doctrine of attorney-client privilege or work product privilege is properly assertable in pending or imminent litigation, the State Auditor is not entitled to access to those records.</p> <p>4. Any of the foregoing facilities to the State Auditor shall not be</p>

			divulged by the State Auditor in such a way to reveal personally identifiable information, and the Office of the State Auditor is reminded of the confidentiality provisions of Sections 29.070 and 29.080, RSMo 1986.
<a href="#"><u>78-87</u></a>	July 31	ARREST. CITY POLICE. POLICE.	A municipal police officer responding to an emergency situation outside the limits of the municipality pursuant to Section 70.820, RSMo 1986 does have arrest powers for violations of state law, but does not have arrest powers for violations of municipal ordinances.
<a href="#"><u>86-87</u></a>	Sept 4	CIRCUIT COURT DRAINAGE DISTRICT. CONFLICT OF INTEREST. DRAINAGE DISTRICT. INCOMPATIBILITY OF OFFICES.	A member of the Board of Supervisors of a drainage district organized under Chapter 242, RSMo, may not accept pay for work such as contract mowing, brush clearing or other similar services.
<a href="#"><u>89-87</u></a>	May 12	COUNTY SHELTERED WORKSHOPS. DEVELOPMENTAL DISABILITIES PROGRAM. TAXATION-SALES TAX.	Transportation sales tax monies distributed under Section 94.645.5, RSMo 1986, and which are expended to the boards of directors established in the City of St. Louis and in St. Louis County under Section 205.970, RSMo 1986, must be used to pay the transportation costs of those clients designated in subsection 5 of Section 94.645, RSMo 1986, regardless of whether those clients reside in the City of St. Louis or in St. Louis County.
<a href="#"><u>90-87</u></a>	June 4		Opinion letter to The Honorable Edwin L. Dirck
<a href="#"><u>91-87</u></a>	May 12		Opinion letter to The Honorable Robert L. Dunning
<a href="#"><u>99-87</u></a>	June 16		Opinion letter to Charles G. Ankrom
104-87			Withdrawn
107-87			Withdrawn
<a href="#"><u>113-87</u></a>	Aug 14		Opinion letter to Paul S. McNeill, Jr.
<a href="#"><u>114-87</u></a>	July 31		Opinion letter to The Honorable Kenneth B. Jacob
<a href="#"><u>115-87</u></a>	Aug 5		Opinion letter to The Honorable William C. Linton
<a href="#"><u>118-87</u></a>	Oct 2		Opinion letter to Carl M. Koupal, Jr.
<a href="#"><u>126-87</u></a>	Oct 2	CANDIDATES. SHERIFFS.	In order for a person to be eligible for the office of sheriff under Section 57.010, RSMo 1986, such person need not have been a registered voter of that county for one whole year before filing for that office.
<a href="#"><u>127-87</u></a>	Dec 18		Opinion letter to The Honorable Roger B. Wilson

<a href="#">128-87</a>	Oct 30	DEPARTMENT OF PUBLIC SAFETY. DIVISION OF WATER SAFETY.	Water patrolmen do not have jurisdiction on all waterways of this state but only upon the waterways enumerated in Section 306.165, RSMo 1986, as described herein. Their jurisdiction upon land is as described herein.
<a href="#">132-87</a>	July 17		Opinion letter to The Honorable Roy D. Blunt
<a href="#">133-87</a>	July 17		Opinion letter to The Honorable Roy D. Blunt
<a href="#">134-87</a>	July 17		Opinion letter to The Honorable Roy D. Blunt
<a href="#">135-87</a>	July 17		Opinion letter to The Honorable Roy D. Blunt
<a href="#">138-87</a>	Dec 18	HIGHER EDUCATION, DEPARTMENT OF. LIBRARIES. PUBLIC RECORDS. RECORDS. SOVEREIGN IMMUNITY. SUNSHINE LAW. STATE LIBRARY.	The Missouri State Library, the libraries of Missouri public institutions of higher education and local public libraries formed under Chapter 182, RSMo 1986, can enter into the restrictions on the copying of records received from OCLC as those restrictions are set forth in Appendix 3 to the OCLC/MLNC agreement and in the Principles and Guidelines attached thereto without violating state laws regarding the availability of governmental records for copying by the public, but the aforementioned governmental entities may not enter into the hold harmless clause in paragraph 10 of Appendix 3 to the OCLC/MLNC agreement because to do so would be an unauthorized waiver of sovereign immunity.
<a href="#">140-87</a>	July 31		Opinion letter to The Honorable Roy D. Blunt
<a href="#">143-87</a>	Aug 5		Opinion letter to The Honorable Roy D. Blunt
<a href="#">144-87</a>	Aug 5		Opinion letter to The Honorable Roy D. Blunt
<a href="#">145-87</a>	Aug 5		Opinion letter to The Honorable Roy D. Blunt
<a href="#">146-87</a>	Dec 4	BONDS. COUNTY COLLECTORS. COUNTY COMMISSIONS.	The amount of the bond of the county collector in a third class county where the county commission has required daily deposits may not be in a sum less than one-fourth of the largest amount collected during any one month of the year immediately preceding the county collector's election or appointment, plus ten percent of the amount.
<a href="#">147-87</a>	Aug 10		Opinion letter to The Honorable Roy D. Blunt
<a href="#">153-87</a>	Aug 13		Opinion letter to The Honorable John Ashcroft
<a href="#">154-87</a>	Aug 14		Opinion letter to The Honorable Roy D. Blunt
<a href="#">155-87</a>	Aug 14		Opinion letter to The Honorable Roy D. Blunt
156-87			Withdrawn
<a href="#">158-87</a>	Aug 21		Opinion letter to The Honorable Roy D. Blunt
<a href="#">159-87</a>	Aug 21		Opinion letter to The Honorable Roy D. Blunt

<a href="#">160-87</a>	Aug 21		Opinion letter to The Honorable Roy D. Blunt
<a href="#">162-87</a>	Aug 28		Opinion letter to The Honorable Roy D. Blunt
<a href="#">165-87</a>	Dec 4	ATTORNEYS. CITY ATTORNEY. CITIES, TOWNS AND VILLAGES. FOURTH CLASS CITIES.	A fourth class city may allocate funds to pay for attorney fees on behalf of the members of the board of aldermen and the mayor when they are sued in their official capacity under the facts described herein.
<a href="#">168-87</a>	Sept 24	DEPARTMENT OF REVENUE. LOTTERIES. LOTTERY COMMISSION.	<p>The decision whether to enter into an agreement with other states for operation of a joint on-line game as discussed herein rests solely with the State Lottery Commission. Provided that the proposed joint on-line game complies with the restrictions in the Missouri Constitution and applicable state statutes, the State Lottery Commission is not foreclosed from participating in such multi-state game. These constitutional and statutory restrictions include, among others, the following:</p> <p>(1) Of moneys received from the sale of Missouri state lottery tickets a maximum of forty-five percent shall be awarded as prizes, a maximum of ten percent shall pay all commissions, administration and promotion costs, and a minimum of forty-five percent shall be deposited in the state treasury to the credit of the general revenue fund.</p> <p>(2) Advertising shall provide only statistical information setting forth the odds of winning and the average return on the dollar in prize money to the public and strict factual statements of (a) the time, date and place of conducting the lottery; (b) the prize structure; (c) the type of lottery game being conducted; (d) the price of tickets; and (e) the locations where tickets for the Missouri state lottery are sold. Advertising shall not be designed to induce persons to participate in the lottery.</p>
<a href="#">170-87</a>	Oct 30		Opinion letter to The Honorable Norman Merrell
<a href="#">173-87</a>	Sept 4		Opinion letter to The Honorable Roy D. Blunt
<a href="#">174-87</a>	Dec 4	CIRCUIT CLERKS.	The circuit clerk may not invest funds deposited into the registry of the circuit court in mutual funds.
<a href="#">178-87</a>	Sept 15		Opinion letter to The Honorable John E. Scott
<a href="#">179-87</a>	Oct 30		Opinion letter to Frederick A. Brunner, Ph.D., P.E.
<a href="#">180-87</a>	Oct 2		Opinion letter to The Honorable Joe McCracken
<a href="#">182-87</a>	Oct 30		Opinion letter to The Honorable Joseph L. Driskill

<a href="#"><u>186-87</u></a>	Sept 24		Opinion letter to The Honorable Roy D. Blunt
<a href="#"><u>188-87</u></a>	Nov 25		Opinion letter to Hugh C. Harvey
<a href="#"><u>190-87</u></a>	Oct 9		Opinion letter to The Honorable Roy D. Blunt
<a href="#"><u>195-87</u></a>	Oct 22		Opinion letter to The Honorable Roy D. Blunt
<a href="#"><u>196-87</u></a>	Oct 30		Opinion letter to The Honorable Norman Merrell
<a href="#"><u>198-87</u></a>	Oct 29		Opinion letter to The Honorable Roy D. Blunt
<a href="#"><u>199-87</u></a>	Nov 9		Opinion letter to Gordon Rolla Upchurch
<a href="#"><u>204-87</u></a>	Dec 4	BALLOTS. COUNTIES. COUNTY ELECTIONS. COUNTY HOSPITAL. ELECTION BALLOTS. ELECTIONS.	The Boone County Commission is not authorized to call a nonbinding preference election on the sale or lease of Boone County Hospital.
<a href="#"><u>214-87</u></a>	Dec 22		Opinion letter to The Honorable George K. Hoblitzelle



## ATTORNEY GENERAL OF MISSOURI

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February 13, 1987

OPINION LETTER NO. 8-87

Richard C. Rice  
Director, Department of Public Safety  
Truman State Office Building  
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Jefferson City, Missouri 65101

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Dear Mr. Rice:

This opinion is in response to your questions asking:

1. May distillers, wholesalers, winemakers, brewers or their employees, officers, or agents lawfully sell draught wine tapping accessories, such as standards, faucets, rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks and check valves, to licensed retailers in this state at a price not less than the cost to the distiller, wholesaler, winemaker or brewer who initially purchased them, for the purpose of dispensing draught wine?

2. If it is lawful for distillers, wholesalers, winemakers, brewers, or their employees, officers or agents to sell draught wine tapping accessories to licensed retailers at a price not less than cost, may distillers, wholesalers, winemakers, brewers or their employees, officers or agents install the draught wine tapping accessories in the retailer's establishment?

3. May distillers, wholesalers, winemakers, brewers or their employees, officers, or agents lawfully provide draught wine coil cleaning service to licensed retailers?

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Clearly, under the present statutory and regulatory scheme, such actions would not be permissible as the only provision allowing distillers, wholesalers, winemakers and brewers to supply draught equipment relates to beer. Therefore, we presume your questions relate to whether a regulation for wine, similar to the present regulation for beer, would be legally permissible.

The main deterrent to allowing distillers, wholesalers, winemakers, and brewers to supply draught wine tapping accessories is Section 311.070.1, RSMo 1986, which provides:

311.070. Financial interest in retail businesses by certain licensees prohibited, exceptions -- sales by drink on premises in promotion of tourism, requirements -- penalties -- certain contracts unenforceable -- contributions to charitable, religious, or educational organizations permitted, when. -- 1. Distillers, wholesalers, winemakers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers; however, notwithstanding any other provision of this chapter to the contrary, for the purpose of the promotion of tourism, a distiller whose manufacturing establishment is located within this state may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises where sold; and provided further that the premises so licensed shall be in close proximity to the distillery and may remain open between the hours of 6:00 a.m. and midnight, Monday through Saturday and between the hours of 11:00 a.m. and 9:00 p.m., Sunday. The authority for the collection of fees by cities and counties as provided in section 311.220, and all other laws and regulations relating to the sale of liquor by the drink for consumption on the premises where sold, shall apply to the holder of a license

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issued under the provisions of this section in the same manner as they apply to establishments licensed under the provisions of section 311.085, 311.090, or 311.095.

Further, Section 311.332.1, RSMo 1986, provides:

311.332. Wholesale price regulation -- discrimination prohibited -- discounts authorized, when -- manufacturer rebate coupons permitted. -- 1. Except as provided in subsection 2 of this section, it shall be unlawful for any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in excess of five percent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail, to discriminate between retailers or in favor of or against any retailer or group of retailers, directly or indirectly, in price, in discounts for time of payment, or in discounts on quantity of merchandise sold, or to grant directly or indirectly, any discount, rebate, free goods, allowance or other inducement, excepting a discount not in excess of one percent for quantity of liquor and wine, and a discount not in excess of one percent for payment on or before a certain date. The delivery of manufacturer rebate coupons by wholesalers to retailers shall not be a violation of this subsection.

However, 11 CSR 70-2.040(1), Rules and Regulations of the Supervisor of Liquor Control, provides in part:

No retail licensee shall directly or indirectly accept any loans, equipment, money, credit or property of any kind, except ordinary commercial credit. No person licensed to sell intoxicating liquor, or nonintoxicating beer at retail, shall permit any distiller, wholesaler, winemaker, brewer, or his or their employees, officers or agents, under any circumstances, directly or indirectly, to have any financial interest in his retail business for the sale of intoxicating liquor, or nonintoxicating beer, and he shall not directly or indirectly, accept from such distiller, wholesaler, winemaker, brewer or their

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employees, officers or agents, any loan, gift, equipment, money, credit, or property of any kind except ordinary commercial credit for intoxicating liquor and non-intoxicating beer sold to such retailer, except that to properly preserve and serve draught beer only, and to facilitate the delivery thereto he may accept, and brewers and wholesalers may lend, give, rent, or sell and they may install or repair any of the following items or render to retail licensees any of the following services: beer coils, and coil cleaning, sleeves and wrappings, box couplings and draft arms, beer faucets and tap markers, beer and air hose, taps, vents and washers, gauges and regulators, beer and air distributors, beer line insulation, coil flush hose, couplings, and bucket pumps, portable coil boxes, air pumps, blankets or other coverings for temporary wrappings of barrels, coil box overflow pipes, tilting platforms, bumper boards, skids, cellar ladders and ramps, angle irons, ice box grates, floor runways, and damage caused by any beer delivery excluding normal wear and tear and a complete record of such equipment furnished and installed, and such repairs and service made or rendered must be kept by the brewer or wholesalers furnishing, making or rendering same for a period of not less than one (1) year.

The provisions of Section 311.070, RSMo 1986, are intended to prevent a "tied house" from arising. A "tied house" concern arises when a retailer is controlled by a wholesaler. The statute prevents such concerns by precluding a licensee in one phase of the liquor traffic from controlling other separate and distinct phases of the liquor traffic. Brown-Forman Distillers Corporation v. Stewart, 520 S.W.2d 1, 7 (Mo. banc 1975). However, this same concern was present when the draught beer exception was enacted. Thus, the question becomes whether a similar exception to that provided for draught beer, if provided for draught wine, would be legally permissible.

Upon close scrutiny, the supply of the listed equipment by a distiller, wholesaler, winemaker or brewer does not violate the "tied house" concern. If the specified equipment is provided at a price not less than cost, it cannot be used as an inducement or a "tie" of the distiller, wholesaler, winemaker or brewer to the retailer. Such a regulation would forbid the

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use of offers of free equipment or equipment reduced in price to "tie" the retail licensee to the distiller, wholesaler, winemaker or brewer. Further, every distiller, wholesaler, winemaker and brewer would have an equal opportunity to supply such equipment and every retail licensee would have the choice of whether or not to serve draught wine and further from whom to purchase the equipment. Thus, the "tied house" concern is eliminated by the requirement that the equipment be sold at not less than cost and by the competition in the marketplace.

There is a further concern beyond that of the "tied house" concern. The Supervisor of Liquor Control is responsible for the issuance, regulation and administration of licenses issued for the sale of intoxicating liquor and nonintoxicating beer. As such, the Supervisor has a duty to protect the health, safety and welfare of the public as it interacts with liquor licensees. Draught wine presents particular problems in this area. It has specialized requirements, some of which are quite different than draught beer. For example, we are informed draught wine must be pressurized with nitrogen rather than CO<sub>2</sub> and also stainless steel fittings must be used rather than brass or chrome which can be corroded by wine. Because of the specialized needs for the supply of draught wine, a distiller, wholesaler, winemaker or brewer is in a better position to determine and provide the proper equipment.

Therefore, as to the first question, a regulation permitting distillers, wholesalers, winemakers and brewers to supply the listed equipment at not less than cost would be permissible. Such a regulation would not violate the "tied house" concern and would not act as an unlawful inducement as the equipment would be provided at not less than cost and the retailer would have the option of purchasing the equipment from whomever he desired. Such a regulation would be similar to that found in the federal regulation, 27 CFR 6.89.

As to the second question, a similar analysis is applicable. One should note that installation of draught beer equipment is permitted under the Missouri regulation, 11 CSR 70-2.040(1), and installation of draught equipment is also permitted under the federal regulation, 27 CFR 6.89. The installation of such equipment will not create a "tied house" problem because once the equipment is installed at a price not less than cost, the retailer would no longer be "tied" to the distiller, wholesaler, winemaker or brewer. Further, nothing would prevent the retailer from purchasing the equipment and installing it on his own. The installation would not act as an inducement because anyone who sold the equipment would be able to perform installations. Also, similar to the concern that the proper equipment be used, there is a concern that the equipment be installed properly. Many retailers do not have

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the technical expertise to install draught wine equipment. The result of poor or improper installation could be spoilage and contamination which would pose a threat to the public.

The final question concerning whether distillers, wholesalers, winemakers and brewers can lawfully provide draught wine coil cleaning service can also be answered in the affirmative. Such service is allowed in Missouri in the case of draught beer, 11 CSR 70-2.040(1), and a similar provision exists in the federal regulation, 27 CFR 6.97. Once again, the "tied house" problem, as well as the concern over inducements, is negated due to the fact that the retailer would not be obligated to procure such cleaning service as the retailer could clean the coils himself. Should the retailer elect to procure such service, he would have the option of choosing between any distiller, wholesaler, winemaker or brewer offering the cleaning service. Furthermore, the Supervisor of Liquor Control, by allowing distillers, wholesalers, winemakers or brewers to provide professional cleaning service would provide a means of insuring that draught wine is served in a safe and sanitary manner.

For the above reasons, we believe that a regulation would be permissible which would: (1) allow distillers, wholesalers, winemakers, brewers or their employees, officers, or agents to sell draught wine tapping accessories, such as standards, faucets, rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks and check valves, to licensed retailers in this state at a price not less than the cost to the distiller, wholesaler, winemaker or brewer who initially purchased them, for the purpose of dispensing draught wine; (2) allow distillers, wholesalers, winemakers, brewers, or their employees, officers or agents to install draught wine tapping accessories in the retailer's establishment; (3) allow distillers, wholesalers, winemakers, brewers or their employees, officers, or agents to lawfully provide draught wine coil cleaning service to licensed retailers.

Very truly yours,



WILLIAM L. WEBSTER  
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February 13, 1987

OPINION LETTER NO. 11-87

W. James Icenogle  
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Camden County Courthouse  
Camdenton, Missouri 65020

Dear Mr. Icenogle:

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This letter is in response to your question asking:

Does a plea of guilty to a felony under federal law (Title 18, Section 371 USC) followed by an order suspending imposition of sentence as to any penitentiary sentence and placing the defendant on probation, but imposing a fine and a community service requirement, constitute a conviction for purposes of forfeiture of elected office under Section 561.021 RSMo?

Section 561.021.1, RSMo 1986, provides as follows:

1. A person holding any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, who is convicted of a crime shall forfeit such office if

(1) He is convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony; or

(2) He is convicted of a crime involving misconduct in office, or dishonesty; or

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(3) The constitution or a statute other than the code so provides.

In State ex rel. Peach v. Tillman, 615 S.W.2d 514, 517 (Mo.App. 1981), the court discussed suspended imposition of sentence.

[2] The statute in effect at the time the court suspended imposition of sentence granted the court power to suspend imposition of sentence and place the guilty person on probation. § 549.071 RSMo 1969. Nothing is said of the nature and consequences of the suspended imposition of sentence. Suspension of imposition of sentence is a hybrid in the law. It is a suspension of active proceedings in a criminal prosecution. It is not a final judgment. State v. Gordon, 344 S.W.2d 69, 71 (Mo. 1961). Because there is no final judgment, there can be no appeal from such an order. See State v. Harris, 486 S.W.2d 227 (Mo. 1972). It has been held that it is not a conviction within the meaning of the Second Offender Act § 556.280 RSMo 1969, State v. Gordon, supra, nor can it be used to impeach a witness under § 491.050 RSMo 1978. State v. Frey, 459 S.W.2d 359 (Mo. 1970).

As stated in other jurisdictions, suspension of imposition of sentence is a matter of "grace, favor and forbearance." Pagano v. Bechly, 211 Iowa 1294, 1298, 232 N.W. 798, 800 (1930). Suspension of imposition of sentence is a salutary means of relieving a person who is guilty of a crime from the stigma of a conviction when the court in its discretion feels that the ends of justice warrant the court's forbearance.

The Missouri legislature amended various statutes to take into account situations in addition to "convictions". Section 491.050, RSMo, dealing with the credibility of witnesses was amended in 1981 to include "any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case." Prior to this amendment, Section 491.050 only considered situations where the witness

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had been "convicted" of a criminal offense. Section 558.016, RSMo dealing with extended terms for prior offenders was amended to refer to "one who has pleaded guilty to or has been found guilty". Previously, it referred to "one who has been previously convicted". Section 577.023, RSMo 1986, dealing with prior intoxication-related traffic offenses refers to "one who has pleaded guilty to or has been found guilty". We note no similar amendment has been made to Section 561.021. Section 561.021 still applies to persons "convicted of a crime".

The Missouri Supreme Court considered suspended imposition of sentence in State v. Lynch, 679 S.W.2d 858 (Mo. banc 1984). The court held that a suspended imposition of sentence was not a final, appealable judgment even though some prejudice now attaches to a suspended imposition of sentence as a result of the statutory revisions discussed above. The court pointed out that (1) the rationale for the Tillman decision was to relieve a person who is guilty of a crime from the stigma of a conviction when the court in its discretion feels that the ends of justice warrant the court's forbearance, (2) this reasoning is no longer applicable due to the recent legislative enactments, and (3) however, no statutory authority existed for an appeal involving a suspended imposition of sentence, because it was not a final judgment. Accordingly, the Missouri view has been and continues to be that a suspended imposition of sentence is not a conviction.

Review of federal law and statutes, however, results in a different conclusion. The federal statute pertaining to suspended imposition of sentence and probation, 18 U.S.C.A. Section 3651, states in pertinent part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

(Emphasis added.)

The federal rule is that a suspended or probated sentence is regarded as having the same effect as any other final judgment

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or conviction. Davis v. Estelle, 502 F.2d 523, 524 (5th Cir. 1974).

Section 561.021.1 pertains to forfeiture of office by a public official who is convicted of a crime. The determinative issue becomes whether the term "convicted" should be construed according to the federal view or Missouri view with respect to whether a suspended imposition of sentence is a conviction. The word "conviction" has more than one connotation. Its implications in a given case are to be determined from the connection in which it is used. United States v. Rosenstengel, 323 F.Supp. 499, 501 (E.D. Mo. 1971). The cardinal rule of statutory construction requires the court to ascertain the true intention of the legislature, giving reasonable interpretation in light of legislative objective. Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985). Legislative intent insofar as possible is to be determined from the language of the statute itself. State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985). The language of the statute indicates that the legislature considered Missouri criminal law dispositive with respect to determining what is a conviction under Section 561.021.1 because the statute relates to felony convictions in Missouri or a conviction under the laws of another jurisdiction of a crime which if committed within this state, would be a felony. The legislature indicated by this provision that Missouri's classifications of criminal activity are dispositive for purposes of applying Section 561.021.1.

Also relevant to construction of this particular statute is the legislative intent that may be gleaned from other statutes. As discussed previously, the legislature amended the extended term provisions, Section 558.016, to apply to a person who has "pledged guilty to or has been found guilty of" certain felonies. Section 491.050, dealing with the credibility of witnesses, was amended to include not only convictions but also prior pleas of guilty, pleas of nolo contendere and findings of guilty. By amendment of these statutes, the legislature recognized that a suspended imposition of sentence was not a conviction and, therefore, changed the wording to include cases where imposition of sentence was suspended. See State v. Lynch, supra, at 861. If the legislature intended for a suspended imposition of sentence to cause a forfeiture of office under Section 561.021.1, the language of the statute could easily have been amended to include pleas of guilty or findings of guilt.

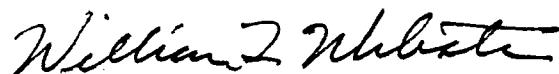
Finally, this issue has been addressed by a Missouri court in an analogous situation. In Warren v. Director, Missouri

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Division of Health, 565 S.W.2d 740 (Mo.App. 1978) the issue presented was whether criminal proceedings in federal court wherein a doctor pled nolo contendere to a charge of distribution of contraband drugs and imposition of sentence was suspended, resulted in a "conviction" within the meaning of Section 195.040.2. The court, in response to an argument that federal law was applicable to the determination of whether a suspended imposition of sentence was a conviction, found that Missouri law rather than federal law should control. Id. at 743. The court held that the term "conviction" has a variable meaning depending upon the context and, therefore, the term may be used in the more strict sense of requiring a final judgment, when the context of the situation involves some collateral adverse consequences such as the loss of privileges or the imposition of a disability. Id. Finally, the court determined that inasmuch as the case turned upon construction of a Missouri statute, Missouri law must be applied. Id.

The reasoning in Warren is equally applicable to the issue presented by the instant facts. The situation presented here involves the question of collateral loss of a valuable privilege, i.e., privilege of holding a public office. It follows that since a suspended imposition of sentence by a Missouri court would not be considered a conviction under Section 561.021.1, neither should a suspended imposition of sentence by a federal court require forfeiture of office.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 890  
(314) 751-3321

February 13, 1987

OPINION LETTER NO. 12-87

Paul S. McNeill, Jr.  
Director, Department of Revenue  
Post Office Box 475  
Jefferson City, Missouri 65102

Dear Mr. McNeill:



This letter is in response to your request for an opinion concerning the payment of interest on cash bonds and protested sales tax payments received by the Director of Revenue. Your questions are as follows:

1. When cash bonds are refunded to taxpayers, is the Department required to pay interest?
  - (a) If the Department is required to pay interest, is the Department required to calculate interest at the current rate, at the rate earned or at an averaged rate?
  - (b) If the taxpayer posts a cash bond and subsequently has a delinquency for the entire amount of the bond, does the taxpayer forfeit the interest as well as the cash bond?
  - (c) If the taxpayer forfeits a portion of the cash bond, is the Department required to refund the interest earned on the remaining balance from the date the bond was posted, or is it required to pay interest earned from the forfeiture date?

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2. As to the payment of interest on protest payments:
  - (a) Is there a conflict between Mo. Rev. Stat. § 30.240 and § 144.700 (Supp. 1984)? Mo. Rev. Stat. § 30.240 states that unless otherwise provided by law, interest shall be credited to the general revenue and Mo. Rev. Stat. § 144.700 (Supp. 1984), states that interest shall be refunded to the taxpayer if the taxpayer prevails.
  - (b) Does the taxpayer "prevail" under Mo. Rev. Stat. § 144.700 if he settles with the Department, or must the taxpayer go to the Administrative Hearing Commission to "prevail" in order to obtain interest on a refund of taxes paid under protest?
  - (c) If the taxpayers are entitled to interest on the protested payments, is the Department required to pay interest on (i) general revenue monies, (ii) local monies or (iii) both?
  - (d) If the taxpayers are entitled to interest, should interest be paid at the current rate, the rate at which the interest was earned, or some other rate?

Your first series of questions deals with cash bonds deposited by applicants for retail sales licenses or licensees required to file such a bond by the Director pursuant to Section 144.087, RSMo. Your second series of questions deals with protest payments received from taxpayers on tax imposed under the Missouri State Sales Tax Law or Use Tax Law pursuant to Section 144.700, RSMo.

The same questions were raised and dealt with in a prior opinion of this office, Opinion Letter No. 27, issued March 31, 1981, to Ray S. James, then Director of Revenue. In that opinion, we noted that both cash bonds and protest payments

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were maintained in accounts by the Director of Revenue rather than the State Treasurer, inferring thereby that such monies did not constitute funds belonging to the state. As such, in the absence of any legislative direction, we opined that interest earned on such funds during the time they were in the custody of the Director of Revenue were to be disposed of in the same manner as the principal. That is, all interest earned on each cash bond along with the bond itself would be returned to the taxpayer upon compliance with the provisions of the Sales Tax Act, or be available to the state for satisfaction of all taxes owed upon default by the taxpayer. With respect to protest payments, the principal and all interest earned while held in trust was to be distributed to the prevailing party in the underlying tax dispute. We also noted the language of Section 161.273, RSMo 1978, which created a right of review in the Administrative Hearing Commission for any taxpayer aggrieved by a final decision of the Director of Revenue. Since this covered a refusal by the Director to refund sales tax paid under protest, the language in Section 161.273 allowing interest at the rate of six percent per annum upon any amount found to be wrongfully collected or erroneously paid was determined to be applicable when a protesting taxpayer appealed successfully to the Administrative Hearing Commission.

The legislature has made several key changes in these statutes since our earlier opinion. Most importantly, cash bonds and protest payments are no longer held in special accounts by the Director of Revenue. Section 144.087.2, as enacted by Senate Committee Substitute for Senate Bills Nos. 669, 700 and 737, Eighty-Third General Assembly, Second Regular Session, now requires all cash bonds to be deposited into the state General Revenue Fund under the care of the State Treasurer. Refunds can be made only from funds appropriated for that purpose by the General Assembly. There is no specific provision regarding interest.

It is well established in this state that funds from the state treasury may not be used to pay interest in the absence of a statute authorizing payment. See, State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission of Missouri, 651 S.W.2d 130, 134 (Mo. banc 1983) cert. denied, 465 U.S. 1001, 104 S.Ct. 1019, 79 L.Ed.2d 223 (1984), rehearing denied 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148 (1984); Noranda Aluminum, Inc. v. Missouri Department of Revenue, 599 S.W.2d 1, 5 (Mo. 1980). The rationale behind payment of interest on cash bonds in our earlier opinion was that such bonds were not state monies because they were maintained by the Director of Revenue and not the State Treasurer. That rationale is no longer applicable. The

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legislature has determined that such bonds do constitute monies belonging to the state by directing that the funds be placed under the care of the State Treasurer and refunded through the appropriation process. Section 30.240, RSMo Supp. 1984, requires the State Treasurer to deposit interest from state monies in General Revenue, unless otherwise provided by law. Since the legislature has not authorized the payment of interest on cash bonds, but only return of the amount of the bond upon compliance with the conditions set forth in subsection 1 of Section 144.087, the Director of Revenue is not permitted to seek interest when presenting warrant requests for the amount of the cash bonds to the Commissioner of Administration and the State Treasurer.

The legislature has also made key changes regarding the payment of state sales and use taxes under protest. In Section 144.700.1, RSMo Supp. 1984, the legislature has specified that all revenue received by the Director of Revenue from the state sales and use tax, except the one cent sales and use tax for the School District Trust Fund collected under Section 144.701, RSMo Supp. 1984, is to be deposited in the state General Revenue Fund, including any payment made under protest. Subsection 4 of Section 144.700, RSMo Supp. 1984, states that all taxes paid under protest are to be refunded to the taxpayer, with all interest income derived therefrom, from funds appropriated by the General Assembly for such purpose, if the taxpayer prevails in the underlying dispute with the Director. In addition, Section 621.050, as enacted by Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 426, Eighty-Third General Assembly, Second Regular Session, the successor to Section 161.273, RSMo 1978, reflects that taxpayers prevailing at the Administrative Hearing Commission are not to receive six percent per annum but are to be paid as specified by Section 144.700, RSMo, where the taxes in question were paid under protest.

Your question on the payment of interest on protest payments is divided into four parts. In answer to question 2 (a), a careful reading of Section 30.240, RSMo Supp. 1984, and Section 144.700, RSMo Supp. 1984, does not reveal any conflict. Section 30.240 requires the crediting of interest earned from state monies to the General Revenue Fund of the state when no other disposition is provided for by law. Subsection 4 of Section 144.700 specifies that all interest income derived from protest payments deposited in the state General Revenue Fund is to be refunded to the taxpayer along with the tax from funds appropriated by the General Assembly

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for such purpose if the taxpayer prevails in the underlying dispute.

In response to question 2 (b), it must be noted that Section 144.700.2, RSMo Supp. 1984, sets forth a specific procedure for paying state sales or use tax under protest. The taxpayer must submit a protest affidavit to the Director of Revenue within thirty days after payment under protest, and appeal from any decision of the Director of Revenue disallowing the making of the payment under protest to the Administrative Hearing Commission or agree to be bound by a final decision involving the same question in another case presently pending in the courts. Since the taxpayer is required to submit a protest payment in advance of any of these remedies, a decision in the taxpayer's favor at any level must be construed as "prevailing." In our opinion, a taxpayer is entitled to interest income derived from the investment of any tax paid under protest, if funds have been appropriated by the General Assembly for such purpose, when a decision in his favor has been reached, whether it be in settlement with the Department of Revenue, a decision by the Administrative Hearing Commission, or a final decision by a court.

In question 2 (c), you ask if the Department is required to pay interest to prevailing taxpayers on local monies as well as general revenue monies. In responding to this question, it is important to note that Section 144.700, RSMo Supp. 1984, does not provide for payment under protest of local sales tax, only tax imposed under the state sales and use tax, except for the one cent sales and use tax established by Proposition C approved November 2, 1982. This tax for the benefit of the public school districts is dealt with in Section 144.701, RSMo Supp. 1984. Therefore, local sales tax collected by the Director of Revenue cannot be placed in a protest account but must be handled in accordance with the particular statutes under which it was authorized and collected. Unless those statutes call for the payment of interest on refunds, none should be paid.

In question 2 (d), you ask the rate of interest to be paid if the taxpayers are entitled to interest upon return of payments made under protest. Section 144.700.4, RSMo Supp. 1984, does not give a specific rate of interest. Rather, it states: "If the taxpayer prevails, then taxes paid under protest shall be refunded to the taxpayer, with all interest income derived therefrom, from funds appropriated by the general assembly for such purpose." The choice of language is very clear. The legislature did not intend to obligate the state to meet a certain rate of interest on protested amounts,

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but simply to return to the taxpayer the amount of interest earned on his protest payment during the time that it was retained in the state treasury, if funds have been appropriated by the General Assembly for such purpose.

In view of the discussion above, we have withdrawn Opinion Letter No. 27, issued March 31, 1981, to Ray S. James, then Director of Revenue.

Very truly yours,

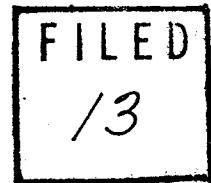
*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

ATTORNEYS:  
BI-STATE DEVELOPMENT AGENCY:  
CONFLICT OF INTEREST:  
INCOMPATIBILITY OF OFFICES:  
LEGISLATORS:  
  
An attorney who is also a member  
of the General Assembly of the  
State of Missouri may not render  
legal services to the Bi-State  
Development Agency of the  
Missouri-Illinois Metropolitan  
District because such would constitute "employment under . . .  
any municipality" of the State of Missouri and would be  
prohibited by Article III, Section 12, Missouri Constitution.

January 27, 1987

OPINION NO. 13-87

The Honorable Elbert A. Walton, Jr.  
Representative, District 61  
State Capitol Building, Suite 317C  
Jefferson City, Missouri 65101



Dear Representative Walton:

You have requested an opinion on the following question:

Please provide me with an opinion as to  
whether or not there is a conflict of  
interest or a prohibition against a Member  
of the Missouri General Assembly providing  
legal services as a private attorney to the  
Bi-State Development Agency -- an agency  
established by interstate compact between  
Missouri and Illinois, as authorized by  
federal law.

\* \* \*

Bi-State is partially self-insured and  
employs an insurance agency to administer  
its liability program. Whenever a claim is  
filed against Bi-State, a private attorney  
is employed to defend said claim. Furthermore,  
Bi-State employs private attorneys to  
render other legal services.

Article III, Section 12 of the Missouri Constitution  
provides:

No person holding any lucrative office  
or employment under the United States, this

The Honorable Elbert A. Walton, Jr.

state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public.

Is Bi-State Development Agency (hereinafter "Bi-State") a "municipality" as that term is used in Article III, Section 12, Missouri Constitution, and does the representation of the agency's legal interest by an attorney qualify as "employment under . . . any municipality"?

The Bi-State Metropolitan Development District was established in 1949 by an interstate compact entered into by the states of Missouri and Illinois with the approval of Congress. The district embraces the City of St. Louis and the counties of St. Louis, St. Charles and Jefferson in Missouri, and the counties of Madison, St. Clair and Monroe in Illinois. The object of the compact was to provide for the future planning and development of the district "holding in high trust for the benefit of its people and of the nation the special blessings and natural advantages thereof". Section 70.370, RSMo 1978.

The compact also created "The Bi-State Development Agency of the Missouri-Illinois Metropolitan District" as "a body corporate and politic" to make plans for the development of the district and with power to plan, construct, maintain, own and operate bridges, tunnels, airports and terminal facilities, among other powers. Section 70.370, RSMo 1978. By subsequent legislation enacted by the two states, the powers of Bi-State were expanded. Section 70.373, RSMo Supp. 1984. The original compact gave Bi-State power to charge and collect fees for the use of facilities owned and operated by it. Section 70.370, RSMo 1978. Missouri also enacted the Transportation Sales Tax Act of 1973, Sections 94.600, et seq., RSMo, allowing for the establishment of local sales taxes to provide revenue for Bi-State.

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The meaning of the term "municipality" depends on the context in which it is used. Beiser v. Parkway School District, 589 S.W.2d 277, 280 (Mo. banc 1979). For instance, when interpreting the term "municipality" in Section 71.185, RSMo 1978, in which sovereign immunity is waived for municipalities, the term "municipality" is construed narrowly because exceptions to sovereign immunity are always construed narrowly. State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 462-463 (Mo. banc 1985); Beiser v. Parkway School District, supra. See also State ex rel. Milham v. Rickhoff, 633 S.W.2d 733 (Mo. banc 1982), which provided a narrow interpretation for the term "municipal corporation" as used in the venue statute for municipal corporations and as applied to the statewide operations of the University of Missouri.

When the context requires the broader meaning for the words "municipal corporation", however, the court does not hesitate to apply it. For instance, the broad meaning of "municipal corporation" was applied in deciding that a drainage district and the St. Louis Housing Authority were "municipal corporations" for purposes of being exempt from taxes under Article X, Section 6, Missouri Constitution 1875, because of the presumption that the state does not intend to tax its political subdivisions. State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, 236 S.W. 15 (1921) and Laret Investment Company v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (banc 1939), and subsequent explanation of these holdings in Beiser v. Parkway School District, supra. Similarly, that broader meaning was adopted for the term "municipality" in Article VI, Section 16, Missouri Constitution, in regard to whether the St. Louis Housing Authority could enter into the cooperative contracts authorized by that provision. St. Louis Housing Authority v. City of St. Louis, 239 S.W.2d 289 (Mo. banc 1951).

When interpreting the constitution, the rules "employed in construction of constitutional provisions are the same as those employed in construction of statutes, but the former are to be given a broader construction due to their more permanent character. . . . This court has recognized that in construction of constitutional provisions, it should undertake to ascribe to words the meaning which the people understood them to have when they adopted the provision. . . . Of course, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole" [citations omitted] Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982).

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Under these principles, the Supreme Court's explanation of the meaning of "municipality" as used in Article VI, Section 16, Missouri Constitution, in regard to governmental entities allowed to enter into cooperative contracts as set forth in St. Louis Housing Authority v. City of St. Louis, supra, is highly persuasive in interpreting "municipality" as used in Article III, Section 12, Missouri Constitution.

"Municipality" is all embracing. It includes, of course, cities of all classes, as well as towns, but it includes also a non-profit agency, such as plaintiff [St. Louis Housing Authority], which is authorized to exercise public and essential governmental functions . . . . Municipality now has a broader meaning than "city" or "town", and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. [Citations omitted.] But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, "municipal corporation", in the broader sense now includes public corporations created to perform an essential public service and "is applied to any public local corporation exercising some function of government". "Municipal corporation" now also includes a corporation created principally as an instrumentality of the state but not for the purposes of regulating the internal local and special affairs of a compact community. [Citations omitted.] [St. Louis Housing Authority v. City of St. Louis, 239 S.W.2d 289, 294-295 (Mo. banc 1951).]

Comparing the description of Bi-State given above to the description of "municipality" set forth in St. Louis Housing Authority v. City of St. Louis, supra, it is evident that Bi-State comes within that description. It is a body politic and corporate exercising functions relating to public needs for transportation and other matters and being financed at least in part by sales tax revenues. It is completely dependent for its existence and characteristics on the General Assembly. The General Assembly has passed laws necessary to its creation and later passed laws necessary to enlarging its powers. Moreover,

The Honorable Elbert A. Walton, Jr.

the legislature passed the Transportation Sales Tax Act of 1973, Sections 94.600, et seq., RSMo, allowing local sales tax money to be used to support Bi-State. Therefore, concluding that Bi-State is a municipality to which Article III, Section 12 is applicable is consistent with the description of "municipality" in St. Louis Housing Authority v. City of St. Louis, supra.

The primary objectives of Article III, Section 12, also require the broad interpretation of municipality as set forth in St. Louis Housing Authority v. City of St. Louis, supra. The passage of laws by the representatives of the people lies at the very root of the republican form of government, and the people approved Article III, Section 12, to provide broad protection for that process. Notice that the provision does not allow the legislator merely to refrain from voting on issues involving the municipality but goes so far as to require vacation of his legislative seat if this provision is violated. The apparent objectives of Article III, Section 12 are to prevent someone who is receiving money by reason of his employment with the municipality from being in a position in the General Assembly to have the discharge of his responsibilities as a legislator affected by his position with the municipality and to prevent even the appearance of this impropriety. Therefore, the word "municipality" should be given a broad interpretation in order to effectuate a policy designed to protect the integrity of the operations of the General Assembly.

The conclusion that Bi-State is a municipality is consistent with this office's description of Bi-State in Attorney General Opinion No. 218, State Tax Commission, December 30, 1964, wherein this office opined that Bi-State was not protected by charitable immunity:

The Agency is a public corporation with power to engage in proprietary functions for the common good. Such functions, although in the public interest and beneficial to the community, are businesses in their fundamental nature, and public bodies (such as municipalities) engaged in such activities have always been liable in tort for negligence to the same extent as private operators of similar enterprises. [citations omitted] The immunity of true charities and charitable institutions from tort liability is based on grounds of public policy. No such public policy exists for the purpose of immunizing municipal corporations (which

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would include the Bi-State Development Agency) from liability for torts in respect of their proprietary functions. [At pages 5 and 6 of Opinion.]

Concluding that Bi-State is a municipality within Article III, Section 12, Missouri Constitution, would also be consistent with Attorney General Opinion No. 317, Durnell, October 23, 1973, in which this office, adopting the broader meaning of municipality as set forth in St. Louis Housing Authority v. City of St. Louis, supra, concluded that the Land Clearance for Redevelopment Authority of the City of Springfield (created pursuant to Sections 99.300 to 99.660, RSMo) was a municipality for purposes of Article III, Section 12. That Authority is very similar to Bi-State in that it is a "public body corporate and politic", Section 99.330, RSMo; is governed by a board of appointed commissioners, Section 99.340, RSMo; and possesses specific functions and powers relating to public services at a local level, Section 99.420, RSMo.

Since Bi-State is a municipality within Article III, Section 12, the next question is whether an attorney's representation of Bi-State in defense of claims against it and in regard to other legal matters, constitutes "employment under . . . any municipality". This issue is resolved by reliance on Attorney General Opinion Letter No. 355, Salveter, August 19, 1969, in which it was concluded that Article III, Section 12 prohibited a legislator from serving as an attorney for a state college.

The term "employment" is subject to a variety of legal interpretations depending upon the context in which it arises. Since the purpose of Article III, Section 12 appears to be to prevent the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies, we are of the opinion that a broad interpretation of the word "employment" is called for when construing that section.

We note that the term "employment" is used with reference to the attorney-client relationship in Supreme Court Rule 4.37. That rule reads, "The duty to preserve his client's confidence outlasts the lawyer's

The Honorable Elbert A. Walton, Jr.

employment, . . ." (emphasis supplied).  
[Page 2 of Opinion.]

In the new Supreme Court Rule 4 (effective January 1, 1986), the term "employment" is still used in the same way. See, Rules 1.5(a)(2); 1.11(c)(1) and (2); 1.12(b); and, 7.3(a) and (b).

Because this matter is resolved by the conclusion that Bi-State is a municipality within Article III, Section 12, we do not opine upon whether the employment as an attorney for Bi-State is also "employment under . . . this state", as discussed in Attorney General Opinion No. 412, Grellner, October 25, 1966; or whether such employment violates Section 105.456.1(1), RSMo Supp. 1985.

#### CONCLUSION

It is the opinion of this office that an attorney who is also a member of the General Assembly of the State of Missouri may not render legal services to the Bi-State Development Agency of the Missouri-Illinois Metropolitan District because such would constitute "employment under . . . any municipality" of the State of Missouri and would be prohibited by Article III, Section 12, Missouri Constitution.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Opinion No. 218, State Tax Commission, December 30, 1964  
Opinion No. 317, Durnell, October 23, 1973  
Opinion Letter No. 355, Salveter, August 19, 1969  
Opinion No. 412, Grellner, October 25, 1966



## ATTORNEY GENERAL OF MISSOURI

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January 22, 1987

OPINION LETTER NO. 14-87

The Honorable Merrill Townley  
Representative, District 111  
Route 1  
Chamois, Missouri 65024

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Dear Representative Townley:

This opinion is in response to your question asking:

Did the Amendment #2 (HJR 21) to the Missouri Constitution which was adopted August 7, 1984, that amended Article IV Section 47, specifically prohibit use of the 1/10 cent sales tax for control of stream bank erosion?

Section 47(a) of Article IV of the Missouri Constitution provides for the levy of a sales and use tax for the purpose of providing additional money for the conservation and management of the soil and water resources of the state and the control, management and regulation of the state parks and for the administration of the laws pertaining thereto. According to Section 47(b) of the same article, any money raised from the additional sales and use taxes can be used by the Department of Natural Resources for the conservation and management of the soil and water resources of the state, for the control, management and regulation of the state parks and for the administration of the laws pertaining thereto and for no other purposes. Further, the expenditure of said money shall be made pursuant to appropriation by the General Assembly. Based upon the additional information in the request, your question relates to the use of the revenue from the additional sales and use taxes for the conservation and management of the soil and water resources of the state. This opinion will not address the use of revenue from the additional sales and use taxes for the control, management and regulation of the state parks.

The Honorable Merrill Townley

Clearly, Section 47 of Article IV of the Missouri Constitution does not specifically mention stream bank erosion. In order to utilize revenue from the additional sales and use taxes for the control of stream bank erosion, such usage of the revenue must fall within the purpose of the conservation and management of the soil and water resources of the state. If control of stream bank erosion is not such a purpose, no revenue from the additional sales and use taxes may be used for control of stream bank erosion.

No definition of the conservation of soil and water resources of the state appears in Section 47, Article IV of the Missouri Constitution. According to Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983), words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary and natural meaning. Obviously, stream banks involve the soil and water resources of the state. Therefore, the plain, ordinary and natural meaning of the conservation of soil and water resources would include the preservation of a stream bank from erosion.

It is the opinion of this office that Section 47 of Article IV of the Missouri Constitution does not specifically prohibit the use of additional sales and use tax revenues for control of stream bank erosion if appropriated by the General Assembly.

Very truly yours,

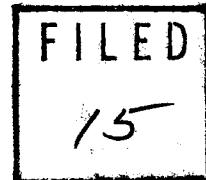
  
WILLIAM L. WEBSTER  
Attorney General

PORt AUTHORITY: A regional port authority under  
PROPERTY: Chapter 68, RSMo 1986, does have  
the authority to purchase real  
property outside of its designated boundaries, including  
property in an adjoining state, as long as it is necessary to  
fulfill the purposes of the port authority.

February 13, 1987

OPINION NO. 15-87

Thomas L. Hoeh  
Perry County Prosecuting Attorney  
Perry County Courthouse  
Perryville, Missouri 63775



Dear Mr. Hoeh:

This opinion is in response to the question of your predecessor in office asking:

May a port authority organized under Chapter 68 RSMo. purchase real property outside of its designated boundaries, including property in an adjoining state, if it is deemed necessary to fulfill the purpose of the port authority?

We understand the following facts give rise to the question:

The New Bourbon Regional Port Authority, consisting of Perry and Ste. Genevieve counties, bordering on the Mississippi River is considering purchasing a small amount of land across the Mississippi River in the State of Illinois to fulfill the purposes of the Port Authority. They question whether they have the authority to purchase property in another state.

Section 68.060.1, RSMo 1986, provides that a regional port authority may be formed by any combination of cities and counties individually eligible to form local port authorities pursuant to Section 68.010, RSMo 1986. This is accomplished by the legislative bodies or county commissions of the cities and counties entering into contracts with each other to create regional port districts to be administered by the regional port authority. Section 68.060.2. The contracts set the boundaries

Thomas L. Hoeh

of the regional port districts and the number, method of appointment, terms, qualifications, salaries, powers and duties of the regional board of commissioners. Section 68.060.3. Those forming the regional port authority apply to the Missouri Highways and Transportation Commission for approval of the regional port authority as "a political subdivision of the state." Section 68.060.1.

Various sections in Chapter 68 set forth the powers of a regional port authority relating to the acquisition of property. Section 68.025, RSMo 1986, provides in pertinent part:

68.025. Powers of port authority. --  
1. Every local and regional port authority, approved as a political subdivision of the state, shall have the following powers to:

\* \* \*

(12) Acquire, own, lease, sell or otherwise dispose of interest in and to real property and improvements situate thereon and in personal property necessary to fulfill the purposes of the port authority;

(13) Acquire rights-of-way and property of any kind or nature within its port districts necessary for its purposes. Every port authority shall have the right and power to acquire the same by purchase, negotiation, or by condemnation, and should it elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the port authority, and it may proceed in the manner provided by the laws of this state for any county or municipality. The power of eminent domain shall not apply to property actively being used in relation to or in conjunction with river trade or commerce;

(Emphasis added.)

Section 68.030, RSMo 1986, provides:

This state and any political subdivision or municipal corporation thereof may in its discretion, with or without

Thomas L. Hoeh

consideration, transfer or cause to be transferred to any port authority or may place in its possession or control, by lease or other contract or agreement, either for a limited period or in fee, any property within a port district or any property wherever situated. Nothing in this section, however, shall in any way impair, alter or change any obligations, contractual or otherwise, heretofore entered into by said entities.

(Emphasis added.)

As a political subdivision of this state, a regional port authority's powers are "limited to those expressed or implied by statute, and any doubt should be construed against the grant of power." State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 462 (Mo. banc 1985).

The provisions of Section 68.025(12) contain no limit on where the property to be acquired must be situated other than that the property must be "necessary to fulfill the purposes of the port authority." Such a provision would ordinarily mean that the regional port authority may acquire property outside of its district. Hafner v. City of St. Louis, 161 Mo. 34, 61 S.W. 632, 634 (1901); McQuillin Mun Corp, Section 28.05 (3rd Ed.).

Although the provisions of Section 68.025(13) limit acquisition to property within the port district, the purpose of that subdivision appears to be to limit the exercise of the right of eminent domain to property within the port authority's boundaries.

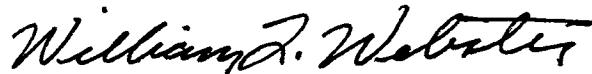
The conclusion that the regional port authority is authorized to purchase real property outside of its designated boundaries is supported by the provisions of Section 68.030 quoted above. If the legislature intended the regional port authority to own only lands within its own district, logically, the legislature would have limited transfers of real property from the state or other political subdivision to only those lands within the district of the regional port authority. In fact, before its amendment in 1979, that section did restrict transfers to a port authority of property outside its district boundaries to property to be used for administrative offices only. By removing this restriction, the legislature made Section 68.030 consistent with Section 68.025(12) regarding the location of property.

Thomas L. Hoeh

CONCLUSION

It is the opinion of this office that a regional port authority under Chapter 68, RSMo 1986, does have the authority to purchase real property outside of its designated boundaries, including property in an adjoining state, as long as it is necessary to fulfill the purposes of the port authority.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

March 19, 1987

OPINION LETTER NO. 16-87

Ronald R. Holliday  
Andrew County Prosecuting Attorney  
Post Office Box 284  
Savannah, Missouri 64485

Dear Mr. Holliday:

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This opinion is in response to your question asking:

Does the fact that a chairman of a Board of Trustees in a Missouri village caused his son to be compensated \$237.97 for computer work done for the village constitute "employment" within the meaning of Article VII, Section 6 of the Missouri Constitutional provisions prohibiting nepotism?

You have indicated the following facts give rise to your question:

The Village of Country Club, Missouri, is governed by an elected Chairman and Board of Trustees. The chairman has a son who is involved with computer sales and service. On June 16, 1986, the Village caused to be paid out of public funds \$237.97 for computer work done for the village. This bill was presented to the Board of Trustees at a public hearing of the Board of Trustees along with several other bills. A motion was made to pay all of the bills and the motion carried by a vote of 4 - 0.

Article VII, Section 6, of the Missouri Constitution provides:

Any public officer or employee in this state who by virtue of his office or

Ronald R. Holliday

employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.

The court has interpreted the predecessor section to Article VII, Section 6 as follows:

The amendment is directed against officials who shall have (at the time of the selection) "the right to name or appoint" a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. . . . State ex inf.  
McKittrick v. Whittle, 63 S.W.2d 100, 101-102 (Mo. banc 1933).

The issue is what constitutes "employment" within the meaning of this constitutional provision. Cases do not address this particular issue directly; however, the court has held that a person who is engaged in the business of installation, maintenance and repair of equipment and who held himself out independently as available for employment by any person or company having need of his services in and around town was an independent contractor and not an employee of the entity which he contracted with for his services, Feldewerth v. Great Eastern Oil Co., 149 S.W.2d 410 (Mo.App. 1941).

In our opinion the chairman's son is not an "employee" of the Village of Country Club within the meaning of the constitutional provision prohibiting nepotism. To find otherwise would make every supplier of goods and services to governmental entities an "employee" of that governmental entity.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
(314) 751-3321

### MEMORANDUM

March 11, 1987

Mr. Vic Downing  
P. O. Box 118  
Bragg City, Missouri 63827

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Dear Mr. Downing:

In reviewing your opinion request 135-86 pertaining to the following question:

"May a local government body such as a county commission or a city council enact an ordinance prohibiting compulsory union membership if this county or city has a charter form of government that will allow them to do so?"

We are concerned that the answer to your request would come after you are no longer a state representative. Normally we do not respond to opinion requests after an individual has left office even though that request came while you were appropriately vested as state representative. We, however, recognize that this is an important issue and offer you the following memo because it is not our intention to avoid answering the question.

We take your reference to "an ordinance prohibiting compulsory union membership" as the equivalent of a reference to what is popularly known as a "right to work law." A division of the Missouri supreme court, in Pfitzinger Mortuary, Inc. and Pfitzinger v. Dill et al., 319 S.W.2d 575 (Mo. 1958), remarked:

. . . Unlike many states Missouri does not have a state labor relations act. . . . Missouri does not have a so-called right-to-work law. . . . The constitution does contain this self-enforcing provision: "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

Mr. Vic Downing

Const. Mo. 1945, Art. 1, Sec. 29; . . . .  
319 S.W.2d at 577 (Commissioner Barrett  
(writer); Judges Storckman, Leedy and Eager).

Twenty years later, the full Missouri supreme court in Independent Stave Company, Inc. v. Higdon et al., 572 S.W.2d 424 (Mo. banc 1978), considered, and rejected "right to work" as an aspect of Article I, (Bill of Rights) § 2, of the Missouri Constitution, and while so holding observed:

. . . [W]e look first to the provisions of the Labor Management Relations Act, 29 U.S.C. §§ 141-187. That law was enacted by Congress in 1947 pursuant to its power to regulate commerce among the states. . . . Where Congress enacts legislation to govern such commerce, it preempts the field to the exclusion of state constitutional or statutory provisions. . . . In this instance, however, the legislation indicates it is not intended to preempt the field.

\* \* \*

It is clear that by the foregoing sections Congress has provided that a "union security" provision which conforms to the type of agreement described in 29 U.S.C. § 158(a)(3) . . . is permissible and that employees are bound thereby unless the state in which the contract is to be applicable has a law which prohibits such agreements. . . . To that extent Congress has not preempted the field. . . . 572 S.W.2d at 425-426 (Judges Finch (writer), Morgan, Bardgett, Donnelly, Rendlen and Seiler; Special Judge Welborn).

. . . The language of art. I, § 2 is very general. It says only "that all persons [shall] have . . . the enjoyment of the gains of their own industry. . . ." In this aspect it differs substantially from the constitutional provisions and statutes in other states which undertake to prohibit or limit such things as "union security" provisions. . . . 572 S.W.2d at 428 (Id.)

Statutes and constitutional provisions

of the other states which have undertaken to prohibit or restrict "union security" provisions have been equally specific. . . .

\* \* \*

We hold that art. I, § 2 of the Missouri constitution does not prohibit the inclusion of a "union security" provision in a collective bargaining agreement. That being true, the "union security" provision in the contract between . . . [Independent Stave Company and Local 42, Coopers International Union] . . . is not prohibited by Missouri law and is valid and enforceable under the provisions of . . . [the Labor Management Relations Act] . . . . 572 S.W.2d at 429 (Id.)

One month after the decision in Independent Stave Company, the voters of Missouri defeated a proposed addition to the Missouri constitution's Bill of Rights (Article I) that would have prohibited "compulsory unionism" or protected the "right to work."<sup>3</sup>

House Report No. 510, June 3, 1947, Committee of Conference, accompanying the Labor-Management Relations Act of 1947, included these remarks:

Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act . . . to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section

Mr. Vic Downing

8(a)(3) of the conference agreement could be said to authorize arrangement of this sort in States where such arrangements were contrary to the State policy. . . . United States Code Congressional Service (1947), p. 1166

Just after enactment of this federal legislation, the United States supreme court, in Lincoln Federal Labor Union No. 19129, AFL et al. v. Northwestern Iron and Metal Co. et al., 335 U.S. 525 (1948) upheld North Carolina statutory and Nebraska constitutional provisions forbidding "compulsory unionism" against challenges based upon the federal constitution (impairment of contract; equal protection and due process of law). The court commented:

. . . Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members. 335 U.S. at 530.

. . . There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or cannot, participate in union assemblies. . . . 335 U.S. at 531

. . . And although several States in addition to those at bar now have such laws, the legislature of as many other States have sometimes repeatedly rejected them. What one State can refuse to do, another can undo. 335 U.S. at 554

When the United States supreme court subsequently considered and upheld state "right to work" laws vis-a-vis the 1947 federal legislation, Retail Clerks International Association, Local 1625, AFL-CIO et al. v. Schermehorn et al., 375 U.S. 96 (1963), the court observed:

While § 8(a)(3) of the Taft-Hartley Act provides that it is not an unfair labor practice for an employer and a union to require membership as a condition of employment provided the specific conditions are met, § 14(b) . . . provides:

\* \* \*

Section 14(b) came into the law in 1947, some years after the Wagner Act. The latter did not bar as a matter of federal law an agency-shop agreement. . . . 375 U.S. at 98-99

By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices -- a state power which we sustained. . . . These laws -- about which Congress seems to have been well informed during the 1947 debates -- had a wide variety of sanctions. . . . In 1947 Congress did not outlaw union-security agreement per se; but it did add new conditions, which . . . require that there be a 30-day waiting period before any employee is forced into a union, that the union in question is the appropriate representative of the employees, and that an employer not discriminate against an employee if he has reasonable grounds for believing that membership in the union was not available to the employee on a nondiscriminatory basis or that the employee's membership was denied or terminated for reasons other than failure to meet union shop requirements as to dues or fees. In other words, Congress undertook pervasive regulation of union-security agreements, raising in the minds of many whether it thereby preempted the field . . . and put such agreements beyond state control. . . . 375 U.S. at 99-101

In light of the wording of § 14(b) and this legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. . . .

. . . Yet even if the union-security agreement clears all federal hurdles, the States by reason of § 14(b) have the final say and may outlaw it. . . . There is thus

Mr. Vic Downing

conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements. . . . 375 U.S. at 102-103

Congress, in other words, chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and enforcement of agreements authorized by § 14(b) and decided to suffer a medley of attitudes and philosophies on the subject. 375 U.S. at 104-105

The highest court of Kentucky, in Kentucky State AFL-CIO et al. v. Puckett, Mayor of Shelbyville et al., 391 S.W.2d 360 (Ky. 1965), struck down a municipal "right to work" ordinance with these observations:

The significant portion of the ordinance is:

". . . the right of persons to work shall not be denied or abridged on account of membership or nonmembership in, or conditioned upon payments to, any labor union, or labor organization; . . ." 391 S.W.2d at 361

. . . The initial question with which we are faced is whether Congress has preempted the field of regulation of such union-security grants to the extent that local political subdivisions of a state have no power to legislate in the field (as affects interstate commerce).

Section 14(b) of the National Labor Management Relations Act, as amended, 29 U.S.C.A. § 164(b), provides:

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State

Mr. Vic Downing

or Territorial law." (our emphasis)  
391 S.W.2d at 361-362

. . . We think it is not reasonable to believe that Congress could have intended to waive other than to major policy-making units such as states and territories, the determination of policy in such a controversial area as that of union-security agreements. We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation. 391 S.W.2d at 362

We recognize that the Kentucky decision did not involve a consideration of the power of constitutionally chartered local governments within a state exercising what is colloquially referred to as "home rule" to enact or adopt "right to work" measures consistent with the federal legislation.

The Missouri constitution, Art. VI (Local Government), provides for constitutional charter government for some counties (§ 18) and many cities (§ 19). About chartered counties, the Missouri supreme court has made these observations:

State ex rel. Cole et al., the St. Louis County Board of Election Commissioners v. Matthews, County Supervisor et al., 274 S.W.2d 286 (Mo. banc 1955)

. . . The provisions of the charter and ordinances of the county which are in conflict with prior or subsequent state statutes relating to governmental matters must yield. . . . 274 S.W.2d at 292 (Judges Hollingsworth (writer), Ellison, Hyde, Dalton and Leedy; Special Judge Anderson)

State on inf. Dalton, Attorney General ex rel. Shepley v. Gamble et al., the St. Louis County Police Commissioners and DuBois, County Police Superintendent, 280 S.W.2d 656 (Mo. banc 1955)

Moreover, charter counties are empowered with some of the powers and functions of a municipal corporation in the

area outside incorporated cities. . . . These are policy powers ordinarily vested in municipal corporations. . . . A county under the special charter provisions of our constitution . . . must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated part of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. . . . 280 S.W.2d at 660 (Judges Storckman (writer), Leedy, Dalton, Hollingsworth, Westhues, Hyde and Eager)

Hellman v. St. Louis County, 302 S.W.2d 911 (Mo. 1957)

Article VI, § 18(b) of the Constitution . . . carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted and are not contrary to the public policy of the state. . . . 302 S.W.2d at 916 (Judges Hollingsworth (writer), Hyde, Dalton and Westhues)

State ex rel. St. Louis County v. Sommers and Kirkpatrick, Secretary of State et al., 426 S.W.2d 72 (Mo. 1968)

. . . Part of the judicial power of the state is vested by the constitution in the circuit, probate, and magistrate courts. . . . The matter of the selection of circuit, probate, and magistrate judges is not a power which is incident to home rule county government. We hold such is not within the power directly granted St. Louis County in its home rule charter or reasonably necessary to the exercise of the powers which are granted to it. . . . Even though St. Louis County under its charter must perform certain state functions over the entire county . . . it is not within the constitutional power granted the county to provide for the manner of selection of such judges. . . . 426 S.W.2d at 74 (Judges Seiler (writer), Storckman and Holman)

Mr. Vic Downing

Flower Valley Shopping Center, Inc. v. St.  
Louis County et al., 528 S.W.2d 749 (Mo.  
banc 1975)

. . . In our opinion, the question whether owners of private property may be compelled to provide police protection for shoppers is also one of state-wide concern and may not be addressed by counties without constitutional or statutory authority more explicit than is found in Art. VI, § 18(b). 528 S.W.2d at 754 (Judges Donnelly (writer), Morgan, Holman, Bardgett, Henley and Finch)

I concur in the principal opinion, but would emphasize that under the provisions of Art. VI, Section 18, Mo. Const., county charters are instruments which grant power and I take what is said in the principal opinion to be said with that in mind. We are not dealing here with a charter which is an instrument to limit power, as is now true of charters for charter cities under the constitutional amendments adopted in 1971 to Art. VI, Secs. 19 and 19(a) as I understand them. A charter city has the power, provided it is consistent with the Constitution and not denied by charter or statute. 528 S.W.2d at 754 (Judge Seiler)

About constitutionally chartered cities, the Missouri Supreme Court has observed:

St. Louis Children's Hospital v. Conway,  
Mayor of St. Louis et al., 582 S.W.2d 687  
(Mo. banc 1979)

. . . [A]rt. 6, sec. 19(a), Mo. Const., clearly grants to a constitutional charter city all power which the legislature could grant. . . . 582 S.W.2d at 690 (Per curiam: Judges Morgan, Bardgett and Seiler; Special Judge Welborn, Senior Judge Finch)

State ex inf. Hannah, Prosecuting Attorney  
ex rel. Christ et al. v. City of St.  
Charles, 676 S.W.2d 508 (Mo. banc 1984)

We have always adhered to the view that

the charter of a home rule municipality, subject to certain limitations, is the organic law of the municipality. . . . However, prior to the adoption of § 19(a) [in 1971], the powers which a home rule municipality could exercise through the constitutional grant of a right to adopt a charter, were limited to the powers which the people of the city expressly delegated to the city under the charter and those powers given by the statute. . . . Section 19(a) clearly grants to a constitutional charter city all power which the legislature is authorized to grant. . . . 676 S.W.2d at 512 (Judges Donnelly (writer), Rendlen, Billings, Gunn, Higgins, Blackmar and Welliver)

. . . [T]he power conferred upon a constitutional charter city by virtue of § 19(a) is subject to whatever limitations are imposed upon that power by the Constitution, by its charter or by statute.

. . .

Under § 19(a), a constitutional charter city is prohibited from exercising its home rule power in a manner that is inconsistent with a state statute. . . . 676 S.W.2d at 513 (Id.)

Cape Motor Lodge, Inc. et al. v. City of Cape Girardeau et al., 706 S.W.2d 208 (Mo. banc 1986)

Under section 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved; the emphasis is whether the exercise of that power conflicts with the Missouri constitution, state statute, or the charter itself. . . . Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance provision is made, the state law provision controls. . . . 706 S.W.2d at 211 (Judges Higgins (writer), Billings, Blackmar, Donnelly, Welliver, Robertson, and Rendlen)

Mr. Vic Downing

The test for determining if a conflict exists is whether the ordinance "permits what the statute prohibits" or "prohibits what the statute permits." . . . 706 S.W.2d at 211 (Id.)

Regardless of the "home rule" powers of a constitutionally chartered county or city to adopt an "anti-compulsory unionism" or "right to work" ordinance insofar as employment relationships with interstate commerce are concerned, we believe that the Congress of the United States has foreclosed all but statewide "right to work" legislation as a means to defeat the federal preemption of the regulation of union security agreements. Clearly there are few industries that come into the state that do not impact on interstate commerce. We do not think the attempted exercise of otherwise proper "home rule" power by a Missouri county or city can defeat the federal regulation of union security agreements within interstate commerce.

Finally, as I have indicated at the outset, we do not feel that we can properly offer to you an official opinion on this subject. Because of the importance of the issue we do feel it appropriate to submit the above memo to you for your information and consideration.

Sincerely,

  
WILLIAM L. WEBSTER  
Attorney General

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<sup>1</sup> The Idaho supreme court, In re Petition of Idaho State Federation of Labor (AFL), etc. concluded that the phrase "right to work" was an insufficient ballot title to inform voters of the true nature of the proposed legislation:

This short title must, therefore, so far as possible within ten words, set forth the characteristics which distinguish this proposed measure and expeditiously and accurately acquainted to prospective signers with what he is sponsoring. . . . 272 P.2d at 710

The chief characteristic and paramount, distinctive features of the proposed statute

are, that a person shall be allowed to seek, gain, obtain and retain employment regardless of whether or not he is a member of a labor union or labor organization.

. . . Thus, tersely stated, this is an initiative measure for the right to work regardless of union membership or non-membership.

This phase of the proposed statute is not in any way presented or mentioned in the short title prepared ["The Right to Work Initiative Proposal."] and hence, it is defective and does not comply with the appropriate statutory requirements. . . .

. . . [N]o doubt in many instances the title as prepared by the Attorney General is commonly used. . . . The deficiency in the title, therefore, in no way reflects any discredit on the learned Attorney General. 272 P.2d at 711.

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In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we [the people of Missouri] declare:

\* \* \*

. . . that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; . . . Art. I, § 2, Mo. Const.

<sup>3</sup>The proposed new Section 29(a) read:

That no person shall be deprived of the right and freedom to work at his chosen occupation for any employer because of payment or nonpayment of dues, fees, assessments, or other charges of any kind to any labor organization; and that any contract which contravenes this right is illegal and void.

This proposition (denominated Constitutional Amendment

Mr. Vic Downing

No. 23) received the approval of 631,829 (40%) and the disapproval of 948,837 (60%) voters at the November 7, 1978 general election.

A proposed "right to work" or "anti-compulsory unionism" constitutional (H.J.R. No. 2) or statutory (H.B. No. 24) provision was introduced in the 1972 session of the Missouri legislature, but to the best of our knowledge, no similar effort in the state legislature has transpired since the 1978 public referendum on the issue.



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

March 19, 1987

OPINION LETTER NO. 18-87

Richard C. Rice, Director  
Department of Public Safety  
Truman State Office Building, Room 870  
Jefferson City, Missouri 65101

Dear Mr. Rice:

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This opinion is in response to your question which can be summarized as follows:

Is the arrest records closure provision contained in Section 3.1 of House Bills Nos. 873 & 874, Eighty-Third General Assembly, Second Regular Session, to be applied prospectively beginning with the records that are compiled on or after January 1, 1988, or is the provision to be applied retrospectively to all records, including those created prior to January 1, 1988?

Section 3.1 of House Bills Nos. 873 & 874, Eighty-Third General Assembly, Second Regular Session has been numbered Section 43.506, RSMo 1986. Such section provides in part as follows:

All information collected under sections 43.500 to 43.530 shall be available only as set forth in section 610.120, RSMo, except that, notwithstanding any provision of law or regulation enacted pursuant thereto, all arrest records where any disposition indicates that a case has been nolle prossed, dismissed, or resulted in acquittal shall be closed for all dissemination purposes five years from the date of the arrest and shall not be opened or made disseminable unless and until the subject is charged with a new or subsequent offense.

Richard C. Rice, Director

The Criminal History Record Information Act, passed by the Eighty-Third General Assembly, Second Regular Session, as House Bills Nos. 873 & 874, creates a central repository for the compilation and dissemination of criminal history records. This act mandates that all law enforcement agencies, the clerks of each court, and the prosecuting and circuit attorneys of every city and county submit criminal record information to the central repository for filing. The filing requirement, however, does not take effect until January 1, 1988. Delayed compliance also can be requested by the reporting agency, court or attorney. See Section 43.524, RSMo 1986.

Section 43.506 provides that arrest records be closed for all dissemination purposes five years from the date of the arrest if the disposition of the arrest indicates that the case has been nolle prossed, dismissed, or resulted in an acquittal. An exception to the five-year-closure provision exists only in those cases where the arrestee is later charged with a new or subsequent offense.

Section 43.506, pertaining to the closure of the arrest records after five years, is a new and significant change in the laws pertaining to criminal records. Previously, when arrest records were closed, the closure did not preclude courts, administrative agencies, law enforcement agencies, and federal agencies from employing such records for purposes of prosecution, litigation, sentencing and parole consideration. See Section 610.120, RSMo Supp. 1984.

The new Criminal History Record Information Act precludes the dissemination of certain enumerated arrest records, five years after the arrest, to any agency or person for any purpose. The question posed is whether the arrest records closure provision contained in Section 43.506 is to be applied prospectively beginning with the records that are compiled on or after January 1, 1988, or whether the provision applies retrospectively to all records, including those created prior to January 1, 1988.

As a general rule, statutes are presumed to operate prospectively, "unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication." Department of Social Services v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985); Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 34 (Mo. banc 1982), appeal dismissed, 459 U.S. 1094, 103 S.Ct. 711, 74 L.Ed.2d 942 (1983); see also Pipe Fabricators, Inc. v. Director of Revenue, 654 S.W.2d 74 (Mo. banc 1983). If the presumption of

Richard C. Rice, Director

prospective application is overcome, then the inquiry focuses on whether the statute falls within any constitutional proscription against retrospective laws. Department of Social Services v. Villa Capri Homes, Inc., supra. For instance, if it is determined that the legislature intended for the statute to be applied retrospectively, thus destroying the usual presumption, then the inquiry focuses on Article I, Section 13 of the Missouri Constitution, which bans retrospective laws in cases where the statute eliminates or impairs any existing vested right. Id.

The legislature has manifested an intent to apply all provisions of the criminal recordation sections in a prospective manner. As noted in U.S. Life Title Insurance Company v. Brents, 676 S.W.2d 839, 842 (Mo.App., W.D. 1984), "[i]f part of the law is prospective in operation, it is evidence that the whole law is intended to be prospective in operation." Here, that portion of the law which pertains to the collection of criminal history records is to take effect on January 1, 1988. It follows, therefore, that the remainder of the law pertaining to the dissemination of the collected information also is to take effect on January 1, 1988.

Moreover, common sense dictates that the section be applied prospectively. Section 43.506 initially provides that any information collected under Sections 43.500 to 43.530 (the new act) be made available pursuant to Section 610.120, and then provides for the complete closure of certain arrest records that are five years old. It would appear, therefore, that Section 43.506 applies only to "information collected under Sections 43.500 to 43.530." If the collection of the information under Sections 43.500 to 43.530 is not scheduled to begin until January 1, 1988, then obviously any provision pertaining to the dissemination of that collected information also could not begin until after January 1, 1988. It would be absurd for the provisions pertaining to the dissemination of information to take effect prior to those provisions pertaining to the collection of the same information. Statutes are not to be interpreted to produce absurd results. State ex rel. ISC Financial Corporation v. Kinder, 684 S.W.2d 910 (Mo.App., W.D. 1985). Although the Missouri State Highway Patrol may currently collect arrest record information, that information is not collected pursuant to Sections 43.500, et seq. (the new act), and thus that information is not subject to the new dissemination restriction set forth in Section 43.506.

A similar issue recently was addressed in Martin v. Schmalz, 713 S.W.2d 22 (Mo.App., E.D. 1986). There, the Court held that Sections 610.100, et seq., pertaining to the closure

Richard C. Rice, Director

of certain arrest records with restrictions, was to be applied retrospectively. In so holding, the Court stated that they were unable to discern any legitimate state interest justifying the disparate treatment of arrest records, predicated solely on the date of the arrest. The Court particularly was concerned that records of groundless arrests, compiled prior to the enactment of Sections 610.100, et seq., were open for public inspection and potential abusive use, while similar arrest records compiled after the enactment of Sections 610.100, et seq., received confidential treatment by closure.

The concerns of the court in Martin v. Schmalz, supra, are not present in the instant case. Arrest records compiled by various governmental bodies will continue to receive the protection of Sections 610.100, et seq., and will not be subject to potential abuse. The Martin case also is distinguishable because Sections 610.100, et seq., contain no language evidencing a legislative intent to have the statutes applied only prospectively. The act in question here, as just discussed, contains a clear indication from the legislature that it is not to take effect until 1988.

The equal protection concerns addressed by the Court in Martin v. Schmalz, supra, also are absent. Here, all records contained in the central repository created by Sections 43.500 through 43.530 (the new act), will be treated in a like manner. There is no arbitrary distinction being drawn solely on the basis of the date of the arrest as in the Martin case. Rather, the only distinction is being drawn between arrest records contained in the central repository and those which are not so included because they may have been compiled at an earlier date and are scattered in the files of various law enforcement agencies.

It is the opinion of this office that Section 3.1 of House Bills Nos. 873 & 874, Eighty-Third General Assembly, Second Regular Session (Section 43.506, RSMo 1986), is to be applied prospectively to those arrest records compiled in the central repository after January 1, 1988.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

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65102

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March 19, 1987

OPINION LETTER NO. 19-87

Lewis R. Crist, Director  
Division of Insurance  
Post Office Box 690  
Jefferson City, Missouri 65102-0690

FILED  
19

Dear Mr. Crist:

This letter is in response to your request for an opinion on the following question:

Will insurance companies that have deferred the payment of premium taxes pursuant to 4 CSR 190-11.130 prior to January 1, 1987, still be required to pay the deferred taxes when the "pay-out" of the annuity commences on or after January 1, 1987?

Generally, insurance companies, domestic or foreign, are subject to an annual tax of two percent per annum upon the direct premiums received in this state or on account of business done in this state. See Sections 148.340 and 148.370, RSMo Supp. 1984. However, insurers were allowed to exclude all premiums received in connection with federally qualified annuities when computing the yearly premium tax. See Section 148.390, RSMo 1978. Although subject to the premium tax, the Division of Insurance for the State of Missouri recognized that certain flexible payment deferred annuities which were not federally qualified could not be taxed accurately based on yearly premiums because the full risk on the contract may not be determinable and may not attach to the insurer until the total number of premiums are actually applied to provide annuity payments. Accordingly, the Division promulgated a rule, 4 CSR 190-11.130, which became effective January 2, 1976. Subsection (2) of this regulation provides:

Reporting premiums for premium tax purposes: Insurers writing flexible payment deferred annuities as defined herein may

Lewis R. Crist, Director

consider as "premiums received" for such contracts within the meaning of sections 148.310 through 148.430 RSMo the amount actually applied at the annuity commencement date to provide the annuity.. Such "premiums received" shall be equal to the value of the contract on the annuity commencement date applied to provide a guaranteed or variable annuity.

You have informed us that approximately sixty-seven insurers have deferred taxation of approximately \$643,531,380.26 in premiums pursuant to this regulation as of the date of your letter, October 20, 1986. A two percent premium tax on this deferred amount would equal approximately \$12,870,627.61.

On June 11, 1986, Senate Bill No. 425, Eighty-Third General Assembly, Second Regular Session, was signed into law. The effective date of Senate Bill No. 425 is January 1, 1987. Under the new law, all annuity contract premiums are to be excluded from taxable premiums, not just federally qualified annuities.

In our opinion, the new law will not allow insurance companies that have deferred the payment of premium taxes pursuant to 4 CSR 190-11.130 to avoid taxation on premiums paid prior to January 1, 1987, even though the total amount of those premiums are yet unknown, because of the unique characteristics of the flexible payment deferred annuity. It is clear from the statutes that the annual premium tax paid by insurance companies in this state is based upon premiums received during a specified time. Before January 1, 1983, the amount of tax due was based on total premiums received in the preceding year; after January 1, 1983, the amount of tax due has been paid in four estimated quarterly installments based upon the last year's tax, with a fifth reconciling installment to be paid if the company owes more tax based on the number of actual premiums received. See Sections 148.350 and 148.380, RSMo Supp. 1984. The regulation promulgated by the Division of Insurance does not create or set the rate of the premium tax on non-federally qualified annuities, it simply defers the payment of taxes already owing until a later date, the date on which the annuity is "fixed" pursuant to the contract. Once that date is reached and the annuity becomes fixed, all premiums included within that annuity which were received prior to January 1, 1987, are subject to the premium tax which was in effect at the time the premiums were originally received by the insurance company.

Lewis R. Crist, Director

The legislature is powerless to release the insurance companies from this obligation. Article III, Section 39(5) of the Missouri Constitution specifically states:

Limitations on power of general assembly.--The general assembly shall not have power:

\* \* \*

(5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation; . . .

The fact that the actual amount of premium tax due under 4 CSR 190-11.130 may not be determined until after January 1, 1987, does not compel a different result. In Graham Paper Co. v. Gehner, 332 Mo. 155, 59 S.W.2d 49, 52 (en banc 1933), the taxpayer claimed that a new income tax law, effective July 3 of the calendar year, must be applied to the entire year because the tax for that year could not be ascertained until the end of the year. Citing Article 4, Section 51 of the Missouri Constitution, a provision virtually identical to the current Article III, Section 39(5), the Missouri Supreme Court rejected the taxpayer's argument. The court held that tax under the old law was due for the period of January 1 to July 3, the effective date of the new law, even though such tax was not yet due or payable on the date when the new law became effective. The court found that such a tax was an obligation or liability within the meaning of the Constitution and could not be extinguished or released by legislative enactment.

We believe the same reasoning applies in this case. The legislature cannot extinguish a tax owed by the insurers on premiums from certain annuities where the premiums were actually paid before January 1, 1987, but the tax deferred pursuant to a regulation promulgated by the Division of Insurance.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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65102

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June 4, 1987

OPINION LETTER NO. 20-87

Mr. Jerry M. Hunter  
Director, Department of Labor  
and Industrial Relations  
421 East Dunklin Street  
Jefferson City, Missouri 65101

FILED  
20

Dear Mr. Hunter:

This opinion is in response to your question asking:

Can contractors and subcontractors doing public works under the Prevailing Wage Law at sections 290.210 through 290.340 pay less than the specified wage rate designated on the wage determinations for apprentices, and, if so, must the apprentices be in a formalized program recognized by the Federal Bureau of Apprenticeship Training of the Federal Department of Labor, and can the payment of apprentices at a lower wage than that specified in the determination be reconciled with section 290.210(5)?

Section 290.210(5), RSMo 1986, provides:

290.210. Definitions. -- As used in sections 290.210 to 290.340, unless the context indicates otherwise:

\* \* \*

(5) "Prevailing hourly rate of wages" means the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character including the basic hourly rate of pay and the amount of the rate of contributions irrevocably made by a

Mr. Jerry M. Hunter

contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan or program, and the amount of the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal or state law to provide any of the benefits; provided, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the department, insofar as sections 290.210 to 290.340 are concerned, may be discharged by the making of payments in cash, by the making of irrevocable contributions to trustees or third persons as provided herein, by the assumption of an enforceable commitment to bear the costs of a plan or program as provided herein, or any combination thereof, where the aggregate of such payments, contributions and costs is not less than the rate of pay plus the other amounts as provided herein.

In response to your question a discussion of the underlying purpose of the Prevailing Wage Law and the public policy behind it is important. The prevailing wage as defined in Section 290.210(5) refers to the wage paid generally in the locality in which the public works are being performed, to workmen engaged in work of a similar character. To find that the prevailing wage rate schedule to be paid on public works as defined in Section 290.210(7), RSMo 1986, will not recognize apprenticeship wages is to overlook the fact that persons employed as apprentices in various construction trades are not

Mr. Jerry M. Hunter

engaged in work of a sufficiently similar character to the workmen employed in those crafts. Inasmuch as apprentices are learners and are less skilled and effective, the requirement of full scale payment of wages would discourage the hiring and training of apprentices in the construction crafts. The payment of full scale wages to apprentices also ignores the fact that apprentices, being learners, are not engaged in the full range of duties as the craftsmen, or journeymen employed in those crafts.

The payment of reduced scale for apprentice craftsmen is possible only if apprentice programs are implemented with sufficient guidelines and standards to insure that payments made to apprentice training funds as outlined in Section 290.210(5) reach the objective intended. The Missouri Prevailing Wage Law lacks a provision to establish necessary prerequisites for acceptable apprentice programs. If an apprenticeship program is in operation, the statute requires that payment for apprentice training funds, if applicable, be withheld by the contractor and paid to the third party or trustee of those funds. Section 290.210(5), RSMo 1986.

The Missouri Division of Labor Standards has historically allowed as acceptable the payments to apprenticeship training funds that were approved by the federal Bureau of Apprenticeship, United States Department of Labor. The necessary prerequisite for acceptable apprenticeship training funds entails substantial conformity with certain standards prior to the employment of the apprentice at below the applicable wage for the construction craft at issue. The above-mentioned standards are found at 29 CFR Chapter V, Parts 521.1 through 521.11.

The adherence to these requirements by contractors employing apprentices on prevailing wage projects is justified for two reasons: The first justification for adherence to federal standards is that the Missouri Department of Labor and Industrial Relations pursuant to Section 290.240, RSMo 1986, is empowered to establish rules and regulations to enforce generally the provisions of the Missouri Prevailing Wage Law and the standards of apprenticeship is a matter that must be determined and enforced by the Missouri Division of Labor Standards within that department. The Division's adherence to federal standards for apprentice training programs insures uniformity and predictability to contractors bidding on prevailing wage projects in Missouri. The second justification for the Division's adherence to federal standards is that the substantial portion of federally matched funds for public construction in Missouri require a wage determination from the

Mr. Jerry M. Hunter

federal Department of Labor under the Davis-Bacon Act, 40 U.S.C. 276a, et seq., wherein the above-cited criteria for apprentice training funds apply. To have apprentice training requirements substantially different from the requirements for federal Davis-Bacon projects may unnecessarily confuse or financially burden contractors who wish to submit bids on public works in Missouri.

In conclusion it is the opinion of this office that the Missouri Prevailing Wage Law allows the payment of reduced scale wages to apprentices engaged in an approved apprentice program as outlined in 29 CFR Chapter V, Parts 521.1 through 521.11, and that this reduced scale is not inconsistent with Section 290.210(5), RSMo 1986.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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65102

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March 19, 1987

OPINION LETTER NO. 21-87

The Honorable Marion Cairns  
Representative, District 97  
17 East Swon  
Webster Groves, Missouri 63119

FILED

21

Dear Representative Cairns:

This opinion is in response to your question asking:

May a county recorder of deeds refuse to accept for recording documents imprinted with a notarial seal which includes the county of residence of the notary public before whom the documents are executed?

Section 486.040, RSMo Supp. 1975, provided:

Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words "notary public", the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state. Immediately below his signature in any certificate or acknowledgement which is to be recorded in the office of a recorder of deeds, he shall print, stamp or type his name, and he shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all of his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence.

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Section 486.040, RSMo Supp. 1975, was repealed and several new statutes concerning notaries were enacted in H.B. 513, Laws of Mo., 1977, p. 642. One new statute was Section 486.285, RSMo 1986, which provides in pertinent part:

1. Each notary public shall provide, keep, and use a seal embosser engraved to show the words "Notary Seal", his name, "Notary Public", and "State of Missouri".

Thus, the 1986 statute does not require the notarial seal to include the name of the county or city, if appointed for such city, in which the notary resides and has his office. The 1986 statutes do, however, still contain certain requirements concerning the county of residence in the following sections. Section 486.295, RSMo 1986, provides:

Any notary public who changes the address of his residence in the county within and for which he is commissioned shall forthwith mail or deliver a notice of the fact to the secretary of state including his old address and his current address. The secretary of state shall notify the county clerk of the change of address. The notary's commission shall remain in effect until its expiration date, unless sooner revoked.

Section 486.315, RSMo 1986, provides:

If a notary public has ceased to have a residence address in the county within and for which he is commissioned, his commission shall thereupon cease to be in effect, unless the secretary of state issues an amended commission. When a notary public, who has established a residence address in a county of the state other than the county in which he was first commissioned, requests an amended commission, delivers his current commission, notice of change form, and five dollars to the secretary of state, the secretary of state shall issue an amended commission to him, for the county in which his new residence is located and shall notify the county clerk of the county where the notary's new address is located. After requesting an amended commission, the notary

The Honorable Marion Cairns

may continue to perform notarial acts with certificates showing the county within and for which he is commissioned, until he receives his amended commission.

From your opinion request, it appears that there are notary publics who are continuing to use seals which still include the county of residence. It also appears that a county recorder of deeds has refused to accept for recording documents imprinted with a notarial seal which includes the county of residence of the notary public before whom the documents were executed.

For the reasons set forth below, it is the opinion of this office that the county recorder of deeds may not refuse to accept for recording documents imprinted with a notarial seal which includes the county of residence of the notary public before whom the documents were executed.

Although there are no Missouri cases directly on point, the case of New v. Corrough, 370 S.W.2d 323 (Mo. 1963), is instructive. In that case, the court stated:

The next issue is whether the omission of the expiration date of the notarial commission on the ballot envelopes invalidated the absentee ballots so as to justify their rejection by the election officials.

. . .

Section 486.040, RSMo 1959, V.A.M.S., applying only to notaries public, provides that every notary public among other things "shall designate in writing, in any certificate signed by him, the date of the expiration of his commission." It has been held, however, that the failure of the notary public to designate in the certificate the expiration date of his commission does not destroy the effectiveness of his certification [citations omitted].

Id. at 326. Thus, the omission of the expiration date of a notary's commission is not fatal to the effectiveness of a notary certification. Then, it would only seem logical that the inclusion of an item on a seal, such as the county of residence, which is not required, should also not be fatal to the effectiveness of a notary certification.

The Honorable Marion Cairns

In addition, 66 C.J.S. Notaries, Section 8, provides in pertinent part:

A notary's certificate, in order to be effective as such, must comply with legal requirements pertaining to matters of substance, but unsubstantial defects in matters of form will not render the certificate invalid.

\* \* \*

The requisites of a notary's seal are fixed and controlled by the law of the locality from which he derives his authority. At common law notaries may provide seals of their own choice. Statutory provisions concerning the emblems, devices, and legends to be borne by the seal have been held to be only directory, and want of compliance therewith has been held not to vitiate the seal or the certificate, but other statutes have been held to require compliance with their terms as a prerequisite to the validity of the seal or the certificate. Slight variations from the legal requirements as to the form of a seal may not invalidate the notarial certificate, as long as there is substantial compliance, and it has been said to be the seal itself, not the name, words, or device on it, that gives authenticity [footnotes omitted].

Similarly, 7 A.L.R., p. 1665, states:

In fact it has been said that since it is the seal, and not its composition or character of words or devices, which raises the presumption of official character, any impression made upon wax or wafer adhering to the paper, "without any device or words indicative of the particular official," is entitled to judicial sanction as evidence of the notarial character of the individual signing his name as such. *Re Phillips* (1876) 14 Nat. Bankr. Reg. 219, Fed. Cas. No. 11,098.

\* \* \*

The Honorable Marion Cairns

Therefore, in light of these authorities and in light of the fact that Missouri law still attaches significance to the county of a notary's residence, the inclusion of the county of residence on a notarial seal, which is not required to be present on the seal, is not fatal to the seal's authenticity or effectiveness. In addition, if there is substantial compliance with the legal requirements as to the form of a seal, it should not invalidate the certificate. If all of the other legal requirements for the form of the seal have been met, then even with the inclusion of the county of residence on the seal, there would be substantial compliance.

It is the opinion of this office that a county recorder of deeds may not refuse to accept for recording documents imprinted with a notarial seal which includes the county of residence of the notary public before whom the documents are executed.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
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65102

P. O. Box 899  
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January 27, 1987

OPINION LETTER NO. 22-87

The Honorable Bob F. Griffin  
Speaker of the House of Representatives  
State Capitol Building, Room 308  
Jefferson City, Missouri 65101

FILED  
22

Dear Speaker Griffin:

This opinion is in response to your questions asking:

a. Are members of the Health and Educational Facilities Authority of the State of Missouri covered under the provisions of the State Legal Expense Fund (Section 105.710 et seq.)?

b. Does the maximum coverage specified in the State Legal Expense Fund (i.e. \$800,000 per occurrence/\$100,000 per claimant) apply to claims against members of the state boards or commissions for liability for breach of duty, neglect, error, misstatement or misleading statement, omission or other act arising out of and performed in connection with their official duties or only to judgments that arise under Sections 537.600 to 537.610 RSMo involving damages arising out of the operation of motor vehicles, injuries to property or personal injury tort claims?

The Health and Educational Facilities Authority of the State of Missouri was created by the legislature as "a body politic and corporate" and constitutes "a public instrumentality and body corporate." Section 360.020, RSMo 1986. The exercise of its statutory powers are "deemed and held to be the performance of an essential public function." Section 360.020, RSMo 1986. It is "declared to be performing a public function in behalf of the state and to be a public instrumentality of the state." Sections 360.085 and 360.135, RSMo 1986. The authority is assigned to the Office of Administration and must annually

The Honorable Bob F. Griffin

file a report on its income, expenditures and revenue bonds issued and outstanding with that office. Section 360.140, RSMo 1986. The proceedings and actions of the authority must comply with "all statutory requirements respecting the conduct of public business by a public agency." Section 360.025, RSMo 1986. The funds of the authority out of which the authority pays expenses and pays back bonds issued by it do not come from the state but from the operations of the authority. Sections 360.080 and 360.090, RSMo 1986.

The authority consists of seven members who are appointed by the governor for a set term of years and who can be removed by the governor for "misfeasance, malfeasance, willful neglect of duty, or other cause after notice and public hearing . . . ." Section 360.020, RSMo 1986. The members receive no compensation except for reimbursement from the authority's funds for all necessary expenses incurred in the discharge of their duties. Section 360.025, RSMo 1986. Section 360.030, RSMo 1986, requires that a chairman, vice-chairman, secretary and treasurer be selected by the members and sets forth their duties.

Section 105.711.2, RSMo 1986, states:

2. Moneys in the state legal expense fund shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against:

(1) The state of Missouri, or any agency thereof, pursuant to section 537.600, RSMo; or

(2) Any officer or employee of the state of Missouri or any agency thereof, including, without limitation, elected officials, appointees, members of state boards or commissions and members of the Missouri national guard upon conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state, or any agency thereof, . . .

In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). The statute may also be interpreted by examining its purpose, the nature of the

The Honorable Bob F. Griffin

problems sought to be remedied by its enactment, and the circumstances and conditions existing at the time of enactment. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983).

The above description of the authority and its members demonstrates that the authority is a "state board or commission" and that its members are "officers of the state" in the broad meaning which must be given to those terms as used in Section 105.711.2, RSMo 1986. That section is written in broad, all inclusive language indicative of the intent of the legislature to allow officials who have the obligation to carry out public duties to do so without fear of incurring claims and lawsuits for money damages and the expenses associated with defending against such actions. Jackson v. Wilson, 581 S.W.2d 39, 45 (Mo.App., W.D. 1979) ("Thus, the plain, unadulterated thrust of the Tort Defense Fund [Section 105.710, RSMo Supp. 1975] was to give greater not less protection to certain named state officials from the consequences of acts performed by them during the course of their official duties.") and In Re 1983 Budget for the Circuit Court of St. Louis County, 665 S.W.2d 943, 944-945 (Mo. banc 1984) ("The [Legal Expense] Fund supplants the former Tort Defense Fund, extending coverage to a broader range of state employees than that afforded by the Tort Defense Fund."). Furthermore, coverage by the Legal Expense Fund also obviates the need to expend the authority's funds for defense and payment of claims, allowing the authority's funds to be spent on expenses more directly related to the authority's public functions. Id. at 945.

The second question is whether the \$800,000/\$100,000 limits established in Section 105.711.4 apply to claims and judgments against the members of the authority. This is a matter pertaining to litigation presently pending involving the Legal Expense Fund. Therefore, this office declines to render an opinion on the second question.

It is the opinion of this office that the provisions of the Legal Expense Fund, Sections 105.711 to 105.726, RSMo 1986, are applicable to the members of the Health and Educational Facilities Authority of the State of Missouri.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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ATTORNEY GENERAL

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65102

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April 6, 1987

OPINION LETTER NO. 25-87

Gary E. Stevenson  
Prosecuting Attorney  
St. Francois County Courthouse  
Farmington, Missouri 63640

FILED

25

Dear Mr. Stevenson:

This opinion is in response to your question asking:

Whether the Open Meetings Law, Section 610.010 et seq., RSMo, applies to a subdivision trust, said trust established and authorized by restrictive covenants which run with the land.

The sections commonly referred to as the "Open Meetings Law" or the "Sunshine Law" are contained in Chapter 610, RSMo 1986. The sections contained in this chapter basically apply to a "public governmental body." Section 610.010(2) defines "public governmental body" as follows:

610.010. Definitions. -- As used in sections 610.010 to 610.030 and 610.100 to 610.115, unless the context otherwise indicates, the following terms mean:

\* \* \*

(2) "Public governmental body", any legislative or administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other

Gary E. Stevenson

legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body. The term "quasi-public governmental body" means any corporation organized or authorized to do business in this state under the provisions of chapter 352, 353, or 355, RSMo, which performs a public function, and which has as its primary purpose to enter into contracts with public governmental bodies, or engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; except urban redevelopment corporations organized or authorized to do business under the provisions of chapter 353, RSMo, which are privately owned, operated for profit, and do not expend public funds;

You have provided to us the following additional facts regarding your opinion request:

Goose Creek Lake Subdivision is a land trust which is authorized by restrictive covenants which run with the land. This trust provides for a Board of Trustees. The duties of the Board of Trustees include making sure that all covenants pertaining to the subdivision are complied with and assessment of maintenance fees of each lot owner. The Board of Trustees have been holding meetings without giving notice to the lot owners or the public.

The Board of Trustees of the subdivision trust is not a "public governmental body" as defined in Section 610.010(2). Therefore, it is our opinion that the provisions of Chapter 610 do not apply to such board.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

February 3, 1987

OPINION LETTER NO. 26-87

The Honorable Frank Bild  
Senator, District 15  
7 Meppen Court  
St. Louis, Missouri 63128

FILED  
26

Dear Senator Bild:

This letter is in response to your request for an opinion as to the meaning of a certain provision in Senate Bill No. 663, Eighty-Third General Assembly, Second Regular Session. Specifically, you ask:

Does a physician having malpractice coverage of \$200,000 per occurrence and \$600,000 aggregate for one year comply with Section 3 of SB 663 of the second regular session of the 83rd General Assembly?

The section in question in Senate Bill No. 663 provides as follows:

1. Beginning on January 1, 1987, any physician or surgeon who is on the medical staff of any hospital located in a county which has a population of more than seventy-five thousand inhabitants shall, as a condition to his admission to or retention on the hospital medical staff, furnish satisfactory evidence of a medical malpractice insurance policy of at least five hundred thousand dollars. The provisions of this section shall not apply to physicians or surgeons who:

The Honorable Frank Bild

(1) Limit their practice exclusively to patients seen or treated at the hospital; and

(2) Are insured exclusively under the hospital's policy of insurance or the hospital's self-insurance program.

2. This section shall not in any way limit or restrict the authority of any hospital in this state to issue rules or regulations requiring physicians or other health care professionals to carry minimum levels of professional liability insurance as a condition of membership on a hospital medical staff.

Although the physician in your example maintains malpractice insurance of \$600,000 in the aggregate for one year, the coverage is limited to \$200,000 per occurrence. In other words, the physician starts each year with coverage of \$600,000 for medical malpractice claims. During that year, all claims may be satisfied from this insurance coverage at a limit of \$200,000 per occurrence until the \$600,000 is exhausted. The question is whether such coverage meets the requirement of the statute that certain physicians maintain medical malpractice insurance of at least \$500,000. In our opinion, it does not. The meaning of the statute must be determined in accordance with certain well established rules of statutory construction. Legislative intent must be ascertained by giving effect to the plain language of the statute when viewed as a whole. A. B. v. Frank, 657 S.W.2d 625, 628 (Mo. banc 1983). Legislative intent and the meaning of the words used in the statute can also be derived from the general purposes of the legislative enactment, and further insight into the legislature's object can be gained by identifying the problem sought to be remedied and the circumstances and conditions existing at the time of enactment. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983).

The language clearly requires a medical malpractice insurance policy of at least \$500,000. It is contained in a section which is part of a legislative enactment concerned with identifying the number of medical malpractice cases existing in this state and in setting standards and limitations for the recovery of damages as a result of acts constituting medical malpractice. Although Section 5.1 of Senate Bill No. 663 limits the recovery by one plaintiff to no more than \$350,000

The Honorable Frank Bild

per occurrence for "noneconomic damages" from any one defendant, there is no ceiling on the total amount of recovery from any one defendant. Therefore, the legislature clearly contemplated recoveries by individual plaintiffs of amounts exceeding \$500,000 from any one defendant.

Because of this, we construe the language of the section of Senate Bill No. 663 quoted above as requiring the maintenance of a medical malpractice insurance policy capable of applying at least \$500,000 against the claim of a single individual.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

AREA AGENCIES ON AGING: An area agency on aging which is  
DIVISION OF AGING: a not-for-profit corporation  
SOCIAL SERVICES, DEPARTMENT OF: incorporated under Chapter 355,  
SUNSHINE LAW: RSMo, comes within the provisions  
of Sections 610.010 through  
610.030, RSMo, the Sunshine Law, because it is a "public govern-  
mental body" as defined in Section 610.010(2), RSMo Supp. 1987.

December 29, 1987

OPINION NO. 27-87

Michael Reagen, Ph.D., Director  
Department of Social Services  
Post Office Box 1527  
Jefferson City, Missouri 65102

27

Dear Dr. Reagen:

This opinion is in response to the question asking:

To what extent are the various types of  
Area Agencies on Aging described in 42  
U.S.C. Section 3025(c) governed by or  
subject to the sanctions provided in the  
Open Meetings Act (or Sunshine Law),  
contained in Sections 610.010 - 610.030,  
RSMo?

An area agency on aging is a local entity designated by the Division of Aging in a particular area of the state to develop and administer a plan and administer available funds for a comprehensive and coordinated system of services for the elderly and handicapped persons who require similar services. Section 660.053(1), RSMo Supp. 1987 and 13 CSR 15-4.010(13).<sup>1</sup> According to 13 CSR 15-4.020(2), there are ten area agencies on aging in Missouri. Most of these are not-for-profit corporations incorporated under Chapter 355, RSMo, and the rest are offices in or divisions of a local or regional governmental entity. The opinion request indicates that you are concerned with the applicability of Sections 610.010 through 610.030, RSMo, to the not-for-profit corporations.

Whether the area agencies on aging which are not-for-profit corporations are subject to the provisions of Sections 610.010 through 610.030, RSMo, commonly referred to as the Sunshine Law, depends on whether they are a "public governmental body" as defined in subsection 2 of Section 610.010, RSMo Supp. 1987. Such subsection provides:

Michael Reagen, Ph.D., Director

(2) "Public governmental body", . . . any quasi-public governmental body. The term "quasi-public governmental body" means any corporation organized or authorized to do business in this state under the provisions of chapter 352, 353 or 355, RSMo, or unincorporated association which (a) performs a public function, and which (b) has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; except urban redevelopment corporations organized or authorized to do business under the provisions of chapter 353, RSMo, which are privately owned, operated for profit, and do not expend public funds;

An examination of the applicable federal and state laws shows that a not-for-profit corporation which is an area agency on aging performs a "public function" with its primary purpose being to enter into contracts with public governmental bodies, and to engage primarily in activities carried out pursuant to agreements with public governmental bodies. These area agencies on aging enter into contracts with the Division of Aging providing for those agencies to administer federal and state grant monies as prescribed by federal and state statutes and regulations. According to the Older Americans Act, the agency's function is to "develop an area plan and to carry out, directly or through contractual or other arrangements, a program in accordance with the plan within the planning and service area." 42 U.S.C. Section 3025(c). Under the federal regulations implementing the Older Americans Act, the area agency on aging is to award government funds to entities who will provide services to older individuals. 45 C.F.R. Sections 1321.71 and 1321.73. Section 660.057.1, RSMo 1986, provides that "an area agency on aging shall operate with local administrative responsibility for Title III of the Older Americans Act, and other funds allocated to it by the division [of Aging]." Subsection 3 of that section details further duties of these area agencies on aging including the following:

(7) Make grants to or enter into contracts with any public or private agency for the provision of social or health services not otherwise sufficiently available to elderly persons within the planning and service area;

Michael Reagen, Ph.D., Director

(8) Monitor and evaluate the activities of its service providers to insure that the services being provided comply with the terms of the grant or contract. Where a provider is found to be in breach of the terms of its grant or contract, the area agency shall enforce the terms of the grant or contract;

\* \* \*

(10) Comply with division [of Aging] requirements that have been developed in consultation with the area agencies for client and fiscal information, and provide to the division information necessary for federal and state reporting, program evaluation, program management, fiscal control and research needs.

The regulations of the Department of Social Services contain further provisions regarding the agency's handling of funds (13 CSR 15-4.170) and of subgrants and contracts (13 CSR 15-4.200).

Based on the foregoing, the area agencies on aging which are not-for-profit corporations do come within the definition of "public governmental body" in Section 610.010(2) by being a "quasi-public governmental body".

#### CONCLUSION

It is the opinion of this office that an area agency on aging which is a not-for-profit corporation incorporated under Chapter 355, RSMo, comes within the provisions of Sections 610.010 through 610.030, RSMo, the Sunshine Law, because it is a "public governmental body" as defined in Section 610.010(2), RSMo Supp. 1987.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

March 19, 1987

OPINION LETTER NO. 30-87

Richard C. Rice  
Director, Department of Public Safety  
Post Office Box 749  
Jefferson City, Missouri 65102-0749

FILED  
30

Dear Mr. Rice:

This opinion is in response to your question asking:

Aside from Section 41.480, RSMo, is there authority under current state law, and specifically under Section 41.470, RSMo, for the Governor to place members of the Missouri National Guard on state active duty to assist in observation and reporting of wild and cultivated marijuana fields within the State of Missouri in support of state and local law/drug enforcement agencies?

The source of the authority and power of state government and of its agencies, such as the militia or national guard, must be found in the state constitution, state statutes or in the necessary implications therefrom.

Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them. These powers cannot be varied or enlarged by usage or by administrative construction. Executive and administrative officers, boards, departments, and commissions have no powers beyond those granted by express provision or necessary implication. [footnotes omitted]. 81A C.J.S. States Section 120, p. 542.

Richard C. Rice

Article III, Section 46 of the Missouri Constitution provides:

Section 46. Militia. The general assembly shall provide for the organization, equipment, regulations and functions of an adequate militia, and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States.

Article I, Section 24 of the Missouri Constitution provides in part:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

\* \* \*

Section 24. Subordination of military to civil power -- quartering soldiers. That the military shall be always in strict subordination to the civil power; . . .

Article IV, Section 6 of the Missouri Constitution provides:

Section 6. Commander in chief of militia -- authority. The governor shall be the commander in chief of the militia, except when it is called into the service of the United States, and may call out the militia to execute the laws, suppress actual and prevent threatened insurrection, and repel invasion.

Pursuant to Article III, Section 46 of the Missouri Constitution, the General Assembly has provided as the source of authority for the "functions" of the National Guard Sections 41.010 to 41.790, RSMo 1986. Section 41.010 provides:

41.010. Title of law -- purpose. -- It is the intent of this chapter, which shall hereafter be known as the "Missouri Military Code", to provide for the state militia and for the organization, equipment, regulations and functions thereof to conform

Richard C. Rice

as nearly as practicable to the laws and regulations for the formation and government of the armed forces of the United States.

Therefore, we have reviewed Chapter 41, RSMo, searching for a source of authority for the National Guard to act as described in your question. As requested, we do not opine whether Section 41.480 resolves your question. An examination of the remaining sections of Chapter 41, including the provisions of Section 41.470, reveals no authority for the National Guard to perform the functions described in your question.

It is the opinion of this office that, excluding any consideration of Section 41.480, there is no authority under current state law for the Governor to place members of the Missouri National Guard on state active duty to assist in observation and reporting of wild and cultivated marijuana fields within the State of Missouri in support of state and local law/drug enforcement agencies.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

April 6, 1987

OPINION LETTER NO. 32-87

The Honorable Steve Danner  
Representative, District 11  
State Capitol Building, Room 235-B  
Jefferson City, Missouri 65101

FILED  
32

Dear Representative Danner:

This opinion is in response to your question asking:

Under the provisions of House Bill No. 1418, can the City of Chillicothe, Missouri obtain payment from non-members of the Chillicothe Rural Fire Protection, Incorporated although the individuals who will be responding to such calls are employees of the City and not volunteers for a fire department manned by volunteers and organized for the purpose of combating fires in a specified area?

You have provided to us a copy of a contract dated December 28, 1964, between The Chillicothe Rural Fire Protection, Incorporated (hereinafter "the Corporation") and the City of Chillicothe, Missouri (hereinafter "the City") and a copy of an Addendum dated April 26, 1982, to said contract. Under the terms of these agreements, equipment purchased by the Corporation is placed in the hands of the City to be housed, maintained, repaired and cared for by the City. The Corporation is to reimburse the City for all oil, grease, maintenance and repairs to the equipment, the cost of gas in fighting fires of members of the Corporation, and the cost of personnel necessary to fight fires of members of the Corporation, along with certain other costs. The City is to provide firefighters to respond to fire calls of members of the Corporation.

The Honorable Steve Danner

Section 1 of House Committee Substitute for House Bill No. 1418, Eighty-third General Assembly, Second Regular Session (now Section 320.300, RSMo 1986) provides:

320.300. Volunteer fire protection association, definition -- As used in sections 320.300 to 320.310, the phrase "volunteer fire protection association" means any fire department which is manned by volunteers and organized for the purpose of combating fires in a specified area. The provisions of sections 320.300 to 320.310 shall apply only to volunteer fire protection associations either partially or wholly funded by membership or subscriber fees and shall not apply to fire protection districts supported by local tax revenues.

(Emphasis added.)

The bill provides for a volunteer fire protection association to charge fees to nonmembers of an association for responding to a fire of a nonmember. The bill further provides for the collection of such charge, including stating the volunteer fire protection association has a cause of action against the property owner. See Section 320.307, RSMo 1986.

A fundamental tenet of statutory construction is that words used in statutes are to be considered in their plain and ordinary meaning in order to ascertain the intent of the lawmakers, Beiser v. Parkway School District, 589 S.W.2d 277, 280 (Mo. banc 1979), Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc 1983), and when a statute is plain and unambiguous, there is no room for construction and it must be applied by the courts as it was written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. banc 1964).

By the language of Section 1 of the bill, the legislature has limited the application of its provisions solely to volunteer fire protection associations which, by definition, are manned by volunteers. The agreements between the Corporation and the City provide that the firefighters responding to fire calls of the Corporation's members shall be provided by the City. The City's firefighters are apparently salaried personnel, not volunteers. Therefore, we conclude that the City of Chillicothe may not obtain payment under House

The Honorable Steve Danner

Committee Substitute for House Bill No. 1418, Eighty-third General Assembly, Second Regular Session, from nonmembers of The Chillicothe Rural Fire Protection, Incorporated for responding to fires of nonmembers.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

COUNTY HIGHWAY COMMISSION --  
DEPARTMENT:  
COUNTY ROADS:  
ROADS AND BRIDGES:  
form of county highway commission.

The provisions of Sections  
230.235 and 230.240, RSMo 1986,  
are required to be implemented  
by third class counties which  
have adopted the alternative

March 19, 1987

OPINION NO. 35-87

The Honorable Doyle Childers  
Representative, District 132  
State Capitol Building, Room 102-B  
Jefferson City, Missouri 65101

FILED  
35

Dear Representative Childers:

This opinion is in response to your questions pertaining to the implementation by a third class county of the alternative form of county highway commission provided for in Sections 230.200 to 230.260, RSMo 1986. Your questions can be summarized as follows:

(1) Is it legally binding that a county road plan shall be prepared by a qualified engineer or firm and approved by the State Highways and Transportation Commission, Section 230.235?

(2) If legally binding, what penalties are involved for noncompliance?

(3) Is it legally binding that under Section 230.240, the County Highway Commission shall employ a qualified graduate civil engineer as County Highway Engineer whose services shall be available to any incorporated municipality in an advisory capacity at no charge with said engineer having general supervision of operations subject to approval of the County Highway Commission?

(4) If legally binding, what penalties are involved for noncompliance?

In the words of the courts, your question is whether Sections 230.235 and 230.240 are mandatory (legally binding) or directory (optional). These statutes provide:

The Honorable Doyle Childers

Section 230.235, RSMo 1986:

Every county adopting sections 230.200 to 230.260 shall formulate a comprehensive road plan establishing a systematic program for the development and improvement of county roads. The plan shall be prepared by a qualified civil engineer or engineering firm familiar with road and highway engineering, and shall be approved by the state highways and transportation commission.

Section 230.240, RSMo 1986:

1. In addition to the comprehensive road plan required by section 230.235, all counties of the third class adopting sections 230.200 to 230.260 shall employ a qualified graduate civil engineer as county highway engineer; except that, any person serving as county highway engineer on the date the county for which he serves adopts the provisions of sections 230.200 to 230.260 may be retained as county highway engineer and shall be considered qualified for that position within the meaning of sections 230.200 to 230.260. The county highway commission shall appoint the county highway engineer and shall set his salary to be paid out of the road and bridge fund of the county. The services of the engineer shall be available in an advisory capacity to any incorporated municipality within the county at no charge to the municipality.

2. The county highway engineer shall have general supervision over the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts, subject to the approval of the county highway commission.

The principles for deciding whether the statutes are of a mandatory or directory nature have been stated as follows:

There is no absolute or universal rule by which statutory provisions may be distinguished and classified as mandatory or

The Honorable Doyle Childers

directory . . . , and resolution of the ultimate issue in most cases is not materially simplified or substantially facilitated by reiteration of general principles expressed in broad, expansive language. It will suffice to say that "'(g)enerally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory'" . . . , but that, in each instance, the "'prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.'" [citations omitted] State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 53 (Mo.App. 1957); accord, State ex inf. Taylor ex rel. Borgelt v. Pretended Consolidated School Dist. No. 3 of St. Charles County, 240 S.W.2d 946, 950 (Mo. 1951).

As explained by our Supreme Court, the mandatory-directory dichotomy ordinarily "arises in determining whether failure to comply with a statutory provision makes an act or proceeding void . . . [w]hen the statute creates an official duty in the interest of the public it is a different matter; and when the General Assembly imposes such a duty upon a public officer, he has no discretion as to whether or not it should be performed." State ex rel. McTague v. McClellan, 532 S.W.2d 870, 871 (Mo.App. 1976); quoting State ex rel. Taylor v. Wade, 231 S.W.2d 179, 181-182 (Mo. banc 1950).

Generally, the use of the word "shall" imposes a mandatory duty upon the official charged by statute with its performance. . . . That is particularly true where, as here, "shall" is contrasted with the use of "may" in describing another procedure in the

The Honorable Doyle Childers

same statutory section. Citizens for Rural Preservation, Inc. v. Robinett, 648 S.W.2d 117, 132 (Mo.App. 1982); accord, State ex rel. McTague v. McClellan, supra, at 872.

Missouri courts have also held that mandatory statutes, in addition to requiring the doing of the thing specified, also prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done. Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769, 770 (1925). However, this is not an absolute rule. State ex inf. Taylor ex rel. Borgelt v. Pretended Consolidated School Dist. No. 3 of St. Charles County, supra, at 950. As in State ex rel. Taylor v. Wade, supra, and State ex rel. McTague v. McClellan, supra, when the question is simply whether an official is required to do something and there is no issue as to the validity of an act or proceeding, the focus of the inquiry as to whether the statute is mandatory is on whether the duty was created "in the interest of the public".

The application of the above principles to questions (1) and (3) leave little doubt that the duties imposed on the county highway commission by Sections 230.235 and 230.240 are mandatory. Both sections require acts whose effect is to enhance the public safety and welfare as well as requiring acts which relate directly to the accomplishment of the powers of the county highway commission. The powers of the commission involve the "improvement, construction, reconstruction, restoration and maintenance of roads . . . ." Section 230.230, RSMo 1986. It is self-evident that a well-planned, well-built and well-maintained road system is essential to the public safety, to the economy of both farm and urban enterprises and to the general social welfare. The General Assembly has made the requirements of Sections 230.235 and 230.240 an integral part of the structure of the county highway system, requiring professional planning as well as professional supervision of the actual work. Furthermore, the General Assembly used the word "shall" to describe the duties in each section and there is no indication that the General Assembly meant anything other than to invoke the general rule that "shall" means mandatory. This is particularly true when within the same set of statutes the General Assembly used "may" in Section 230.250 to indicate that the commission has the option, not the duty, to designate a certain amount of the county roadway to become part of the permanent supplementary state highway system. Citizens for Rural Preservation, Inc. v. Robinett, supra, at 132.

The Honorable Doyle Childers

In deciding on the mandatory nature of a law, the courts will also consider the effects of construing the law to be either mandatory or directory. State v. Paul, 437 S.W.2d 98, 101 (Mo.App. 1969). It is essential in any system of building and maintaining of a road system to have a comprehensive plan as well as professionally supervised work. If the counties with the alternative form of county highway commission could treat Sections 230.235 and 230.240 as being directory only, the plain purpose of the General Assembly in setting up a county highway commission and requiring certain standards of its work would be thwarted.

Interpreting Sections 230.235 and 230.240 as being mandatory is in accordance with the conclusion reached in Missouri Attorney General Opinion No. 48, Kesterson, March 18, 1943, a copy of which is enclosed, wherein this office opined that counties were required to set up a county highway commission under Article 2 of Chapter 46, RSMo 1939.

If the County Highway Commission Act should be considered as directory, then the various County Courts of the State by not following its provisions could nullify the Act. Another statutory construction which might be applicable here is that the Legislature should not be held to have enacted a meaningless statute. After considering this entire Act we are convinced that the lawmakers have intended that it be mandatory and that its provisions be carried out by the various County Courts. Id. at page 3.

As for questions (2) and (4), there are no penalties set forth in Sections 230.200 to 230.260 for failing to follow Sections 230.235 and 230.240. Nevertheless, the commissioners must obey the law.

The protection of the public and the declared public policy requires public officials to comply with mandatory statutory provisions, and such requirements may not be avoided by a compliance only when the official sees fit to comply. Fulton v. City of Lockwood, 269 S.W.2d 1, 8 (Mo. 1954).

To enforce this principle, the legislature enacted Sections 106.220 to 106.290, RSMo 1986. Section 106.220 provides:

The Honorable Doyle Childers

Any person elected or appointed to any county . . . office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful . . . violation or neglect of any official duty, . . . , shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290.

See also Section 531.010, RSMo 1986, which provides for removal from office by proceedings in quo warranto.

#### CONCLUSION

Therefore, it is the opinion of this office that the provisions of Sections 230.235 and 230.240, RSMo 1986, are required to be implemented by third class counties which have adopted the alternative form of county highway commission.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 48, Kesterson, March 18, 1943

MILITARY SERVICE:

When purchasing creditable

STATE EMPLOYEES:

prior service as a state

STATE EMPLOYEES' RETIREMENT SYSTEM:

employee for military  
service, the amount of

payment computed is to bear interest at least from the date that the employee was employed by the state after leaving military service and, if the employee does not pay the required amount at the time of filing his election to purchase credit with the retirement system, the employee is to pay interest upon any unpaid balance.

February 24, 1987

OPINION NO. 36-87

The Honorable Gladys Marriott  
Representative, District 51  
State Capitol Building, Room 313C  
Jefferson City, Missouri 65101

FILED  
36

Dear Representative Marriott:

This opinion is in response to your question concerning the purchase of retirement credit for military service. Your request for our opinion states:

House Bill 1496 passed in 1986 made numerous changes in the statutes governing retirement of public officials including a new section (104.340.12) allowing certain members of the Missouri State Employees Retirement System (MOERS) to purchase up to 2 years of military service credit. This purchase is to be effected by the member paying to MOERS, with interest, an amount equal to what the state would have paid on his behalf. Once the amount is determined, it could be paid to MOERS over a period of up to 2 years with interest on the unpaid balance.

There has been a great deal of confusion as to how the interest on the original amount due is to be calculated. I would appreciate your review of this situation and your opinion as to how and on what period this interest should be calculated.

Section 104.340.12, RSMo 1986, provides:

The Honorable Gladys Marriott

12. Any member who had served in the armed forces of the United States prior to becoming a member, or who is otherwise ineligible under subsection 1 of this section, and who became a member within eight years after his discharge under honorable conditions may elect, within five years after membership or within six years from August 13, 1986, whichever is later, and prior to retirement, to purchase creditable prior service equivalent to such service in the armed forces, but not to exceed two years, provided he is not receiving and is not eligible to receive retirement credits or benefits from any other public or private retirement plan for the service to be purchased, and an affidavit so stating shall be filed by the member with the retirement system. The purchase shall be effected by the member's paying to the retirement system with interest, an amount equal to what would have been contributed by the state in his behalf had he been a member for the number of years for which he is electing to purchase credit and had his compensation during such period of membership been the same as the annual salary rate at which he was initially employed as a member, with the calculations based on the contribution rate in effect on the date of election to purchase credit. The payment shall be made over a period of not longer than two years, measured from the date of election, and with interest on the unpaid balance. Payments made for such creditable prior service under this subsection shall be treated by the retirement system as would contributions made by the state and shall not be subject to any prohibition on member contributions or refund provisions in effect at the time of enactment of this subsection.

(Emphasis added.)

In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to

The Honorable Gladys Marriott

be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). The statute may also be interpreted by examining its purpose, the nature of the problems sought to be remedied by its enactment, and the circumstances and conditions existing at the time of enactment. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983). It is apparent from the plain language of Section 104.340.12 that it was legislative intent to charge interest both for some time period prior to the date of the election to purchase credit and also on any unpaid balance after the date of such election.

To properly determine the amount which must be paid in order to effect a purchase of military service as creditable prior service for the purpose of computing retirement benefits payable to the members, Section 104.340.12 establishes certain definite criteria. The amount is to be based upon:

1. "the number of years for which he is electing to purchase credit" -- If the employee is purchasing two years of military service as creditable prior service, then the amount is based upon what the state would have contributed for a two-year period.
2. "the annual salary rate at which he was initially employed as a member" -- We interpret this phrase as referring to the annual salary rate on the date the employee was initially employed so as to be a member of the retirement system. The computation of the amount which must be paid to effect a purchase of military service as creditable prior service presumes this to be the salary during the time period for which creditable prior service is being purchased. For example, if the initial salary of an employee upon becoming a member of the retirement system is \$2,000 per month, the computation presumes the employee's salary remained at \$2,000 per month during the time period for which creditable prior service is being purchased.
3. "the contribution rate in effect on the date of election to purchase credit" -- This is the percentage rate the state is contributing for retirement purposes as of the date the employee files with the retirement system his election to purchase credit.
4. "with interest" as contained in the phrase "the member's paying to the retirement system with interest, an amount equal . . . ." -- In order to insure proper funding of retirement benefits, the state must make a contribution to the retirement

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system based on payroll figures for the individuals working for the state and the contribution is invested by the system to earn interest or other income to insure proper accrual of funds to guarantee availability of sufficient funds at the time of an individual's retirement. Bearing in mind how contributions and the income produced are utilized to produce necessary funds at the time of retirement, it is apparent the payment made to buy credit for military service must, of necessity, include an interest payment and Section 104.340.12 so provides. Had the employee's state service been funded in the normal course of events, that funding would have earned income throughout the period and it is reasonable to assume that the period being purchased should be treated as being attached to the beginning of that person's state service. This is particularly true since the statutory computation rate is based on "the annual salary rate at which he was initially employed." Therefore, we conclude that the amount computed should bear interest at least from the date that the employee was employed by the state after leaving military service.

5. "with interest on the unpaid balance" -- If the employee does not pay the required amount at the time of filing with the retirement system his election to purchase credit, the employee is to pay interest upon any unpaid balance, much like an interest-bearing installment note.

#### CONCLUSION

When purchasing creditable prior service as a state employee for military service, the amount of payment computed is to bear interest at least from the date that the employee was employed by the state after leaving military service and, if the employee does not pay the required amount at the time of filing his election to purchase credit with the retirement system, the employee is to pay interest upon any unpaid balance.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

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July 13, 1987

OPINION LETTER NO. 40-87

The Honorable John F. Bass  
Senator, District 4  
State Capitol Building, Room 220  
Jefferson City, Missouri 65101

FILED

40

Dear Senator Bass:

This opinion letter is in response to your question asking:

Is a chamber of commerce or similar business league a "charitable organization" within the meaning of subdivision (1) of section 407.453, RSMo 1986?

Section 407.453(1), RSMo 1986, defines "charitable organization" as follows:

**407.453. Definitions.** -- As used in sections 407.450 to 407.478, the following terms shall mean:

(1) "Charitable organization", any person, as defined in section 407.010, who does business in this state or holds property in this state for any charitable purpose and who engages in the activity of soliciting funds or donations for, or purported to be for, any fraternal, benevolent, social, educational, alumni, historical or other charitable purpose;

Sections 407.450 through 407.478, RSMo 1986, are referred to as the "Charitable Organizations and Solicitations Law." These sections provide certain "charitable organizations" must file various registrations and reports specified in these sections before soliciting funds in this state or employing a professional fundraiser to solicit funds in this state for any

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charitable purpose. Whether an entity is a "charitable organization" as defined in Section 407.453(1) affects its need to comply with the requirements of the Charitable Organizations and Solicitations Law.

#### PART A

##### Nature, Purpose and Characteristics of Chambers of Commerce and Similar Business Leagues

In order to determine whether "a chamber of commerce or similar business league" comes within the definition of "charitable organization" in Section 407.453(1), we must first determine its nature, purpose and characteristics.

There are no provisions in state law describing or defining chambers of commerce or business leagues. However, various other sources of the kind regularly utilized by courts for definitions give fairly consistent definitions or descriptions of these terms.

Webster's Third New International Dictionary at page 372 sets forth the following:

Chamber of commerce: an association of businessmen to promote the commercial and industrial interests of a community, state, or nation . . . .

14 C.J.S. Chamber at page 351 provides, in pertinent part:

Chamber of commerce. A board or association to promote the commercial interests of a locality, a country, or the like; a society of the principal merchants and traders of a city who meet to promote the general trade and commerce of the place.  
[Footnote omitted.]

12A C.J.S. Business at page 489 provides, in pertinent part:

Business league. An association of persons having some common business interest, which limits its activities to work for such common interest and does not engage in a regular business of a kind ordinarily carried on for profit; an organization of the same general class as a

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"board of trade," or a "chamber of commerce; . . . ." [Footnote omitted.]

Court cases dealing with the terms "chamber of commerce" and "business league" usually arise in regard to whether the organization is exempt from federal income taxation under 26 U.S.C. Section 501(c)(6) which provides:

(a) Exemption from taxation. -- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

\* \* \*

(c) List of exempt organizations. -- The following organizations are referred to in subsection (a):

\* \* \*

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The Secretary of the Treasury has promulgated Treas. Reg. Section 1.501(c)(6)-1 which provides, in pertinent part:

A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for

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profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of section 501(c)(6) and is not exempt from tax.

(Emphasis added.)

In considering the above provisions, courts have offered their own descriptions of chambers of commerce and business leagues.

The United States District Court in Louisville Credit Men's Adjustment Bureau v. United States, 6 F.Supp. 196 (W.D. Ky. 1934), stated that chambers of commerce, boards of trade and real estate boards

. . . are not business concerns, in the sense that they operate for profit or render that individual paid service to the public, or even to their own members, that is customarily performed by individuals or organizations for the purpose of making money. Their function is a semi-civic one, having to do in large part with the general welfare of the business or businesses represented by their membership. Id. at 198.

(Emphasis added.)

The court in Crooks v. Kansas City Hay Dealers' Association, 37 F.2d 83 (8th Cir. 1929), stated that a chamber of commerce "is generally understood to be 'a society of the principal merchants and traders of a city who meet to promote the general trade and commerce of the place.' 11 C.J. p. 228." (Emphasis added.) The Hay Dealers' Association in that case was found to be conducive to "the general welfare by establishing an honest market for the buying and selling of hay

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and straw and by assisting in preserving its integrity." Id. at 85.

The court in Glass Container Industry Research Corporation v. United States of America, 70-1 USTC paragraph 9214 (W.D. Pa. 1970), p. 82,852, stated:

Generally speaking, chambers of commerce and boards of trade are organizations of businessmen who are engaged in many diverse lines of business. Every community of any size has a chamber of commerce or board of trade whose members are merchants or other business people interested in promoting and publicizing the advantages of an area and the advantages of doing business in the particular city with the merchants or other business people in that city. Id. at p. 82,856.

(Emphasis added.)

In accordance with the above are the holdings by the courts in Retailers Credit Association of Alameda County v. Commissioner of Internal Revenue, 90 F.2d 47, 50-51 (9th Cir. 1937) (holding that an essential characteristic of a chamber of commerce or board of trade is that they have "purposes to advance and protect business interests"), and Produce Exchange Stock Clearing Association v. Helvering, 71 F.2d 142, 144 (2nd Cir. 1934).

More recently, the United States Supreme Court reviewed the meaning of the terms "chamber of commerce" and "business league" in its opinion in National Muffler Dealers Association, Inc. v. United States, 440 U.S. 472, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979). Relying on dictionary definitions, court opinions and the legislative history of the Tariff Act of October 3, 1913, 38 Stat. 114, in which 26 U.S.C. Section 501(c)(6) had its genesis, the court held that the common factor of chambers of commerce, business leagues and boards of trade is that they have "'for their primary purpose the promotion of business welfare.'" Id., 440 U.S. at 481. Quoting from a statement submitted by the United States Chamber of Commerce to the Senate Committee on Finance which was considering the Tariff Act, the court set forth the following:

"While its (commercial organization) original reason for being is commercial advancement, it is not in the narrow sense

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of advantage to the individual, but in the broad sense of building up the trade and commerce of the community as a whole

... [Emphasis added.] Id., 440 U.S. at 478 quoting from Briefs and Statements on HR 3321 filed with the Senate Committee on Finance, 63d Cong., 1st Sess., 2002 (1913).

"These organizations receive their income from dues . . . which business men pay that they may receive in common with all other members of their communities or of their industries the benefits of cooperative study of local development, of civic affairs, of industrial resources, and of local, national, and international trade." Id.

#### PART B

##### Analysis

According to Section 407.453(1), there are various factors to apply to chambers of commerce and business leagues to determine whether they are "charitable organizations". First, they must be persons under Section 407.010(5), which provides:

(5) "Person", any natural person or his legal representative, partnership, firm, for profit or not for profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

We understand that most local chambers of commerce are incorporated as not for profit corporations. These would be "persons" under the above-quoted statutory provision. Whether the rest are persons depends on the facts and circumstances of each entity but they would probably come under the term "business associations" and, as such, are "persons".

The second factor is whether the chamber of commerce or business league does business in this state for any charitable purpose or whether it holds property in this state for any charitable purpose. "Property" can, of course, be either real or personal. Section 1.020(14), RSMo 1986. For purposes of

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the Charitable Organizations and Solicitations Law, as long as an organization is conducting its affairs in accordance with the purposes for which it was organized, it is conducting<sup>1</sup> business even though it is a not for profit organization. Therefore, if a chamber or commerce or business league is engaging in the type of activity described in Part A of this opinion, it is doing business in this state.

The second factor also concerns the purpose of the business being conducted or of the holding of the property. This must be determined by applying the definition of "charitable purpose" as set forth in Section 407.453(2) to the facts of each case. Section 407.453(2) provides:

(2) "Charitable purpose", any purpose which promotes, or purports to promote, directly or indirectly, the well-being of the public at large or any number of persons, whether such well-being is in general or limited to certain activities, endeavors or projects;

For purposes of this opinion, we will assume that the doing of business and holding of property are done by chambers of commerce and business leagues local to this state and are done in the course of the normal activities of those entities as they were described in Part A. Basically, chambers of commerce and business leagues are not for profit entities engaging in activities which will benefit the business community in the geographic area concerned, or, as in the case of business leagues, in the particular line of business being represented. This is not a "charitable purpose" as set forth above. That description is a codification of the definition of "charity" and "charitable purpose" developed by Missouri courts in the context of determining which groups are exempt from certain taxes and unemployment compensation laws. In Sunday School Board of the Southern Baptist Convention v. Mitchell, 658 S.W.2d 1 (Mo. banc 1983), the Supreme Court of Missouri held that a charity is

'a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public

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buildings or works or otherwise lessening the burdens of government.

. . . A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public.'

[Citation omitted.] Charity is not limited 'solely to the relief of the destitute' but instead includes 'all humanitarian activities, though rendered at cost or less, which are intended to improve the physical, mental and moral condition of the recipients and make it less likely that they will become burdens on society and make it more likely that they will become useful citizens.' [Citation omitted.] Id. at 4-5.

The purposes and activities of chambers of commerce and similar business leagues as described in Part A do not fit within this description. Their purpose is to promote the welfare of profit-making businesses. Although this may benefit the general public or parts thereof by improving economic conditions generally or by providing jobs, such incidental benefits of profit making or commercial activity have never been considered to be the result of charitable purposes. For instance, contributions to a chamber of commerce are not considered charitable contributions for purposes of deductions for federal income tax purposes. Rev. Rul. 58-293, C.B. 1958-1, p. 146, and Mertens Law of Federal Income Taxation Vol. 9, Sec. 34.20, p. 218. Therefore, the usual activities by which a chamber of commerce or a business league "does business" or "holds property" are not "for any charitable purpose" as that phrase is used and defined in subdivisions (1) and (2) of Section 407.453. It is certainly possible, of course, that a chamber of commerce or business league could depart from its usual activities and purposes and engage in an activity whose purpose is a charitable one under this Law.

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That, however, can be determined only by an analysis of the specific activity at issue.

The third factor is whether the entity in question engages in the solicitation of funds or donations for a charitable purpose. As just stated, whether a specific activity or course of conduct on the part of a chamber of commerce or business league meets this factor can be answered only by reference to the facts and circumstances surrounding that particular conduct. If such an entity engages in that activity it would be doing "business in this state . . . for any charitable purpose" as that phrase is used in Section 407.453(1). This conduct would cause the entity and its activities to meet not only this third factor but also the second factor even though it was a departure from its usual activity and purposes.

The above discussion demonstrates that chambers of commerce and similar business leagues could be considered "charitable organizations" for purposes of the Charitable Organizations and Solicitations Law depending on the facts and circumstances of the particular conduct in question. They are "persons" under Section 407.453(1) and whether they are subject to the Law depends on the facts and circumstances of each instance of activity which is alleged to constitute doing business or holding property for any charitable purpose or to constitute soliciting funds or donations for a charitable purpose. When they engage in this type of activity, they subject themselves to the requirements of the Charitable Organizations and Solicitations Law unless exempted by Section 407.456.2.

Section 407.456.2 exempts the following organizations from certain of the requirements of the Charitable Organizations and Solicitations Law:

2. The provisions of sections 407.459 and 407.462, and subsection 1 of section 407.469 shall not apply to the following:

- (1) Religious organizations;
- (2) Educational institutions and their authorized and related foundations;
- (3) Fraternal, benevolent, social, educational, alumni, and historical organizations, and any auxiliaries associated with any of such organizations, when solicitation of contributions is confined to the

The Honorable John F. Bass

membership of such organizations or auxiliaries;

(4) Hospitals and auxiliaries of hospitals, provided all fund-raising activities and solicitations of contributions are carried on by employees of the hospital or members of the auxiliary and not by any professional fundraiser who is employed as an independent contractor;

(5) Any solicitation for funds governed by chapter 130, RSMo; and

(6) Any organization that has obtained an exemption from the payment of federal income taxes as provided in section 501(c)(3) of title 26, United States Code, as amended, if, in fact, no part of the net earnings of the organization inure to the benefit of any private party or individual associated with such organization.

As the description of chambers of commerce and business leagues set forth in Part A demonstrates, they are not the kinds of entities set forth in any of these subdivisions. Therefore, to the extent chambers of commerce and business leagues depart from their usual activity and purposes and engage in business or hold property for any charitable purpose and also engage in the solicitation of funds or donations for a charitable purpose they are subject to the requirements of the Charitable Organizations and Solicitations Law.

It is the opinion of this office that chambers of commerce and business leagues are "charitable organizations" under the Charitable Organizations and Solicitations Law, Sections 407.450 to 407.478, RSMo 1986, only to the extent that they do business in this state or hold property in this state for a "charitable purpose", as that term is defined in subsection 2 of Section 407.453, and also engage in the solicitation of funds or donations for a charitable purpose. They are not exempt organizations under Section 407.456.2.

Very truly yours,

*William L. Webster*

WILLIAM L. WEBSTER  
Attorney General

The Honorable John F. Bass

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<sup>1</sup>In the context of a wide variety of laws, courts have held that terms such as, "doing business", are not limited to denoting commercial, financial or other business enterprises which are organized for profit. These terms more broadly denote any activity in which an entity is organized to engage. This includes the activities of religious, charitable, benevolent and other not for profit organizations. See authorities listed in American Medical Association v. United States, 130 F.2d 233, 237 n. 15 (D.C. 1942); affirmed, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943); and the holdings in Zucker v. Baker, 35 Misc.2d 841, 231 N.Y.S.2d 332, 334-335 (S.Ct. 1962), and State ex rel. Griffith v. Knights of Ku Klux Klan, 117 Kan. 564, 232 P. 254, 258-260 (1925); app. dism., 273 U.S. 664 (1926).



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April 23, 1987

OPINION LETTER NO. 41-87

Richard C. Rice, Director  
Missouri Department of Public Safety  
Post Office Box 749  
Jefferson City, Missouri 65102

Dear Mr. Rice:

FILED

41

This opinion letter is in response to your questions asking:

1. Does a criminal record check on a person who is applying for a permit to purchase a gun come under the definition of "administration of criminal justice" in Section 43.500(7), RSMo 1986?
2. Are criminal history record checks by the Division of Liquor Control on individuals who are applying for a state liquor license considered to be related to the "administration of criminal justice" as defined in Section 43.500(7), RSMo 1986?

The "administration of criminal justice" is defined in Section 43.500(7), RSMo 1986, which provides as follows:

43.500. Definitions. -- As used in sections 43.500 to 43.530, the following terms mean:

\* \* \*

(7) "Administration of criminal justice", performance of any of the following activities: detection, apprehension,

Richard C. Rice, Director

detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information, including fingerprint searches, photographs, and other indicia of identification.

Therefore, by definition the "administration of criminal justice" includes the detection of accused persons or criminal offenders.

Under Section 571.080, RSMo 1986, a person must obtain a permit in order to purchase a concealable firearm. A person is ineligible to acquire a permit to purchase a concealable firearm if he has "pled guilty to or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of two years or less that does not involve an explosive weapon, firearm, firearm silencer or gas gun;" (Section 571.090.1(2), RSMo 1986). A person is also ineligible to obtain a permit to acquire a concealable firearm if he is "a fugitive from justice or currently charged in an information or indictment with the commission of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States other than a crime classified as a misdemeanor under the laws of any state and punishable by a term of imprisonment of two years or less that does not involve an explosive weapon, firearm, firearm silencer or gas gun;" (Section 571.090.1(3), RSMo 1986). Clearly, criminal history record information is absolutely essential for a determination to be made as to whether a person would qualify to acquire a permit to purchase a concealable firearm. Detection of accused persons or criminal offenders is one of the elements of the "administration of criminal justice" as defined under Section 43.500(7), RSMo 1986. Therefore, a criminal history record check on a person who is applying for a permit to purchase a concealable weapon comes under the definition of "administration of criminal justice" as defined in Section 43.500(7), RSMo 1986.

Section 311.050, RSMo 1986, provides that no person may sell intoxicating liquor without having first obtained a liquor license. Section 311.060.1, RSMo 1986, provides that no person shall be issued a liquor license in the State of Missouri

Richard C. Rice, Director

unless such person is of good moral character. Section 311.060.1 further provides that no person shall be granted a liquor license or permit who has been convicted of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor. Criminal history record information is absolutely essential in making a determination as to whether a person is of good moral character. Further, it is imperative to have the criminal history record information to determine whether a person has been convicted of violating the provisions of any law applicable to the manufacture or sale of intoxicating liquor. As such, criminal history record checks by the Division of Liquor Control on individuals who are applying for a state liquor license would fall under the definition of "administration of criminal justice."

It is the opinion of this office that criminal history record checks on persons applying for a permit to purchase a concealable weapon and on persons applying for a state liquor license are related to the detection of accused persons or criminal offenders and, therefore, come under the definition of "administration of criminal justice" as defined in Section 43.500(7), RSMo 1986.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
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October 2, 1987

OPINION LETTER NO. 44-87

Mr. Thomas M. Johnson  
St. Clair County Prosecuting Attorney  
Post Office Box 314  
Osceola, Missouri 64776

FILED  
44

Dear Mr. Johnson:

This opinion letter is in response to your question asking:

Was the action of the St. Clair County Commission taken in September, 1986, relating to the imposition of a sales tax of one-half of one percent on utility services, valid, where there had been, in 1984, a vote of the people in St. Clair County which approved the imposition of a sales tax of one-half of one percent?

The tax in question is contained in Sections 67.500 to 67.545, RSMo 1986, which sections are referred to as the "County Sales Tax Act." Subsection 3 of Section 67.505 states that the tax may be imposed on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any county adopting such tax if such property and services are subject to taxation by the State of Missouri under the provisions of Sections 144.010 to 144.510, RSMo. Furthermore, Section 67.520.1(2), provides that all exemptions available under Sections 144.010 to 144.510, RSMo, are also available under the County Sales Tax Act.

In 1984 at the time the county sales tax was proposed and submitted to the voters in St. Clair County, Section 144.030.2(23), RSMo, exempted from the state sales tax all sales of metered water service, electricity, electrical current, natural, artificial or propane gas, wood, coal or home

Mr. Thomas M. Johnson

heating oil for domestic use, except as otherwise provided in Section 144.032. Section 144.032, RSMo, provided that counties by ordinance could impose a sales tax under the provisions of Sections 67.500 to 67.545, RSMo, upon all sales of metered water services, electricity, electrical current and natural, artificial or propane gas, wood, coal, or home heating oil for domestic use only.

Article X, Section 22(a) of the Missouri Constitution, which was adopted in 1980 as part of what is commonly referred to as the Hancock Amendment, provides in part:

Section 22. Political subdivisions to receive voter approval for increases in taxes and fees -- rollbacks may be required -- limitation not applicable to taxes for bonds. (a). Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. ...

The County Sales Tax Act was adopted in St. Clair County by the voters in 1984 without limitations or qualifications of any kind. That is, at the time the voters of St. Clair County adopted the county sales tax, the statutes governing such tax authorized the county to impose the tax on such utility services for domestic use by ordinance. By authorizing the tax, the voters also authorized the County Commission to impose the tax upon the sale of such utility services for domestic use within the county under the provisions of Section 144.032.

Mr. Thomas M. Johnson

Therefore, it is the opinion of this office that the imposition of the sales tax by the St. Clair County Commission on such utility services does not violate the Hancock Amendment.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
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JEFFERSON CITY  
65102

P. O. Box 899  
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October 30, 1987

OPINION LETTER NO. 46-87

The Honorable Neil Molloy  
Representative, District 81  
House Post Office  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Molloy:

This opinion letter is in response to your question asking whether a particular group of state merit system employees may establish a political action committee to endorse candidates and contribute to partisan political campaigns for state and federal offices.

Your opinion request states that such endorsements and contributions would be made by a "governing council" and not by individual employees in their own behalf. We infer from the context, and therefore assume, that the governing council would be composed of persons who are merit system employees.

Your question requires consideration of various provisions in Section 36.150, RSMo 1986, which is part of The State Personnel Law, Chapter 36, RSMo, and which imposes a number of restrictions upon political activity by merit system employees. Subsections 4 and 5 of Section 36.150 provide as follows:

4. No person shall in any manner levy or solicit any financial assistance or subscription for any political party, candidate, political fund, or publication, or for any other political purpose, from any employee in a position subject to this law, and no such employee shall act as agent in receiving or accepting any such financial contribution, subscription, or assignment of pay. No person shall use, or threaten to use, coercive means to compel an employee to give such assistance,

The Honorable Neil Molloy

subscription, or support, nor in retaliation for his failure to do so.

5. No employee selected under the provisions of this law shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club. He shall take no part in the management or affairs of any political party or in any partisan political campaign. No such employee shall be a candidate for nomination or election to any partisan public office or nonpartisan office in conflict with his duties except he resign, or obtain a regularly granted leave of absence, from his position.

In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). Several of the restrictions in subsections 4 and 5 appear germane to your question. Subsection 5 provides that no merit system employee shall be an officer of a partisan political club, and that a merit system employee shall take no part in the management or affairs of any political party or in any partisan political campaign. Subsection 4 provides that no person shall in any manner levy or solicit from a merit system employee any financial assistance or subscription for any political party, candidate, political fund, or for any other political purpose. Moreover, no merit system employee shall act as agent in receiving or accepting any such financial contribution or subscription. We are unable to imagine how a political action committee composed of state merit system employees could be established, or generate funds, or otherwise function without some of those persons engaging in acts prohibited by Section 36.150, RSMo 1986.

Therefore, it is the opinion of this office that a particular group of state merit system employees may not establish a political action committee to endorse candidates and contribute to partisan political campaigns for state and federal offices.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY

65102

August 25, 1987

P. O. Box 899  
(314) 751-3321

OPINION LETTER NO. 48-87

The Honorable Roy Cagle  
Representative, District 127  
State Capitol Building, Room 135  
Jefferson City, Missouri 65101

FILED  
48

Dear Representative Cagle:

This opinion letter is in response to your questions asking:

Do "professional services" consisting of "the performance of engineering studies and analysis" concerning a specific utility system in Missouri, which services are sought by a state agency, constitute "practice as a professional engineer" as that term is defined in Section 327.181, RSMo; and would Section 327.191, RSMo, require that such services be rendered by an engineer or engineering firm licensed by the Missouri Board for Architects, Engineers and Land Surveyors?

And should such professional services be procured through the procedure set forth in Sections 8.285 through 8.291, RSMo, or through the bid procedure contained in Section 34.040, RSMo?

You have informed us that the Division of Purchasing of the Office of Administration issued a Request for Proposal No. B90514 seeking procurement on behalf of the Missouri Public Service Commission of professional services for engineering studies and analyses and expert testimony involving the Grand Avenue Steam Production Plant and high pressure steam distribution systems of Kansas City Power and Light Company.

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You have further informed us that the Division of Purchasing utilized the bid procedure set forth in Chapter 34, RSMo, and that the Public Service Commission did not follow the provisions in Sections 8.285 through 8.291, RSMo 1986.

Your first question asks whether the providing of professional services consisting of the performance of engineering studies and analyses constitutes practice as a professional engineer. The provisions of Chapter 327, RSMo require that anyone rendering or offering to render engineering services must be an engineer or engineering firm licensed by the Missouri Board for Architects, Professional Engineers and Land Surveyors. Section 327.181, RSMo 1986, provides:

Any person practices in Missouri as a professional engineer who renders or offers to render or holds himself out as willing or able to render any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, engineering teaching of advanced engineering subjects or courses related thereto, engineering surveys, and the inspection of construction for the purpose of assuring compliance with drawings and specifications, any of which embraces such service or work either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects and including such architectural work as is incidental to the practice of engineering; or who uses the title "professional engineer" or "consulting engineer" or the word "engineer" alone or preceded by any word indicating or implying that such person is or holds himself out to be a professional engineer, or who shall use any word or words, letters, figures, degrees, titles or other description indicating or implying that such person is a professional engineer or is willing or able to practice engineering.

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We believe that the undertaking of professional services such as the performance of engineering studies and analyses would fall within the plain meaning of Section 327.181. The plain meaning of the statutory language is to be given effect whenever possible. State ex rel. D. M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). Moreover, legislative intent must be ascertained by giving effect to the plain language of the statute when viewed as a whole. A. B. v. Frank, 657 S.W.2d 625, 628 (Mo. banc 1983).

It is clear that the services sought in the bid proposal included:

[S]ervice or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, . . . engineering surveys, . . . in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects. . . .

Moreover, the use of the term "engineering studies" is limited to those individuals who are licensed by the Missouri Board. Section 327.181 defines the practice of engineering to include the use of the title professional engineer or consulting engineer or the word engineer alone or preceded by any word indicating or implying that such person is or holds himself out to be a professional engineer, or who shall use any word or words, letters, figures, degrees, titles, or other description indicating or implying that such person is a professional engineer or is willing or able to practice engineering. Therefore, it is our opinion that the professional services described must be provided by an engineer or engineering firm licensed by the Missouri Board for Architects, Professional Engineers and Land Surveyors.

The second question is whether the procedure employed by the Division of Purchasing in Request for Proposal No. B90514 utilizing the provisions in Chapter 34 were appropriate or whether the provisions of Sections 8.285 through 8.291 should have been used. Section 8.285, RSMo 1986, provides:

It shall be the policy of the state of Missouri and political subdivisions of the

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state of Missouri to negotiate contracts for architectural, engineering and land surveying services on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable prices.

Section 8.291 describes the procedure to be employed for the negotiation of a contract for a project using architectural, engineering, or land surveying services. Section 8.287 defines project as "any capital improvement project or any study, plan, survey or program activity of a state agency or political subdivision thereof, including development of new or existing programs."

We understand the contract in question resulting from Request for Proposal No. B90514 has already been awarded. Our office represents the State in any litigation that may arise as a result of such contract. Our opinion on the award of the specific contract in question at this time would not alter the award of this contract. With respect to future requests for proposals of a similar nature, our office upon request will provide guidance regarding our interpretation of the relevant statutory provisions. Therefore, we must respectfully decline to opine upon the second question you have posed as it relates to Request for Proposal No. B90514.

However, in an effort to provide guidance to you and the state agencies involved, enclosed herein is a copy of Missouri Attorney General Opinion Letter No. 22, Muckler, 1980. In this opinion letter, we stated:

The expert witness services to which we refer are of a particularly unique character because such expert witnesses are a part of an attorney's case for which the attorney bears the professional responsibility. As a consequence, it is our view that the services of such expert witnesses were not and are not now subject to the requirements of the purchasing law.

To the extent the services procured are expert witness services, such services are not subject to the bid procedure of Chapter 34, RSMo, or the procurement procedure set forth in Sections 8.285 through 8.291, RSMo 1986.

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In summary, it is the opinion of this office that the professional services described in Request for Proposal No. B90514 must be provided by an engineer or engineering firm licensed by the Missouri Board for Architects, Professional Engineers and Land Surveyors. In procuring expert witness services, such services are not subject to the bid procedure of Chapter 34, RSMo, or the procurement procedure set forth in Sections 8.285 through 8.291, RSMo 1986.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 22, Muckler, 1980

TAXATION -- PROPERTY: (1) Political subdivisions may revise their property tax rates upward to the extent permitted by statute without a vote of the people, subject to limitations discussed herein;

TAXATION -- RATE:

TAXATION -- SCHOOLS:

REASSESSMENT:

(2) changes in assessed valuation constituting a general reassessment as defined in Section 137.073, RSMo 1986, are to be considered a general reassessment even if the changes are the result of implementing a biennial maintenance plan; (3) school districts can adjust their Proposition C rollback pursuant to Section 164.013, RSMo 1986, as discussed herein; and (4) to the extent there is a conflict between Section 137.115, RSMo 1986, and Section 137.073, RSMo 1986, in adjusting tax rates, the provisions of Section 137.115, RSMo 1986, apply. We do not opine on whether the maximum tax rate calculated in 1985 under Article X, Section 22 of the Missouri Constitution can be exceeded in 1987 without a vote of the people.

March 23, 1987

OPINION NO. 49-87

The Honorable Margaret Kelly, CPA  
State Auditor  
State Capitol Building, Room 224  
Jefferson City, Missouri 65101

and

The Honorable David L. Rauch  
Representative, District 121  
State Capitol Building, Room 206-B  
Jefferson City, Missouri 65101

Dear Mrs. Kelly and Representative Rauch:

Each of you has posed questions relating to the setting of property tax rates. Because of the similarities in the questions posed, we have combined your requests into one opinion. The questions posed by State Auditor Kelly are as follows:

- A. Will changes in the assessed valuation of a substantial number of parcels of agricultural and horticultural land in a county made by an assessor in 1987 pursuant to an assessment and equalization maintenance plan under Section 137.115, RSMo, constitute a "general



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reassessment" under Section 137.073,  
RSMo?

1. Depending upon the answer to the above question, which constitutional and statutory provisions govern the process of setting 1987 tax rates?
- B. To what extent may political subdivisions revise tax rates upward in 1987 under Section 137.115, RSMo and Article X, Section 22(a) of the Missouri Constitution?

The questions posed by Representative Rauch are as follows:

1. Under the provisions for setting tax rates in Senate Bill 476 of the 1986 session, in a year in which an assessment maintenance and equalization plan is implemented, may political subdivisions increase property tax rates without a public vote to maintain their level of property tax revenues if the assessed valuation of the subdivision decreases? If yes, what are the limitations involved?
2. Under the special assessment maintenance law tax rate revision provisions, can implementation of a biennial maintenance plan also constitute a "general reassessment" as defined in Section 137.073, RSMo? If yes, may a school district's levy also be adjusted for revenue loss resulting from a reduction in assessed valuation pursuant to Section 164.013, RSMo? Are the levy adjustments provided in HB 1022, et al, 1986, applicable?
3. If the answer to No. 2 is yes, what effect does the 1980 tax limitation amendment have on increases in tax rates made without a public vote? What are the limitations? Are adjustments limited to one year or can they extend beyond one year?

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The questions posed involve an interpretation of various constitutional and statutory provisions.

Article X, Section 22(a) of the Missouri Constitution (enacted as part of what is commonly referred to as the Hancock Amendment) provides:

Section 22. Political subdivisions to receive voter approval for increases in taxes and fees -- rollbacks may be required -- limitation not applicable to taxes for bonds. (a). Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

(Emphasis added.)

A copy of Section 137.115, RSMo 1986, as enacted by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 476, Eighty-third

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General Assembly, Second Regular Session, is attached hereto as Appendix I.

A copy of Section 137.073, RSMo 1986, as enacted by Senate Committee Substitute for House Substitute for House Committee Substitute for House Bills Nos. 1022, 1032 and 1169, Eighty-third General Assembly, Second Regular Session, is attached hereto as Appendix II.

We have been provided the following additional information regarding the opinion requests:

Under the provisions of Senate Bill 476, 1986 real property is subject to a biennial assessment review in 1987. The state tax commission has provided counties with a range of productive values for agricultural and horticultural land for 1987 assessment purposes that is considerably lower than the range used in 1986. Thus many rural political subdivisions face a decrease in assessed valuation as a result; some reductions can be substantial.

Section 137.026, RSMo 1986, provides for the State Tax Commission to determine and publish a range of values for each of the several classifications of land classified as agricultural and horticultural property. On or before January 1, 1987, and each odd-numbered year thereafter, the State Tax Commission shall make these ranges of fair value available to the assessors of each county. See also Section 137.021, RSMo 1986. Pursuant to the authority in Sections 137.026 and 137.021, the State Tax Commission has recently amended 12 CSR 30-4.010 to reflect lower values for each grade of agricultural land.

#### Upward Revision of Tax Rates

As a result of agricultural land having a lower assessed valuation in 1987 than in 1986, the total assessed valuation of political subdivisions in agricultural areas may be substantially less in 1987 than it was in 1986. If such a political subdivision levies the same tax rate in 1987 as it levied in 1986, the property tax revenue for that political subdivision will be substantially less in 1987 than it was in 1986. For example, if a county's 1987 assessed valuation is \$20,000,000 but its 1986 assessed valuation was \$26,000,000 and its tax rate remains at \$0.30 per \$100 assessed valuation for both 1986 and 1987, the 1987 revenue from property tax will be only \$60,000

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compared to \$78,000 of property tax revenue in 1986. (This example and future examples do not consider the costs associated with the collection of property taxes and the amount of uncollectible taxes.)

The first issue to be addressed is whether a political subdivision may increase its 1987 property tax rate above the 1986 property tax rate without a vote of the people so as to maintain the same level of property tax revenue even if there has been a decrease in the total assessed valuation of the political subdivision. Continuing with the example set forth above, for the county to receive in property tax revenue for 1987 the \$78,000 it received in 1986, its property tax rate would have to increase to \$0.39 per \$100 assessed valuation in 1987 from the \$0.30 per \$100 assessed valuation in 1986 (\$20,000,000 assessed valuation times \$0.39 per \$100 assessed valuation equals \$78,000 property tax revenue).

Section 137.115.1(2) contains the phrase, "shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce . . ." (Emphasis added.) Section 137.073.2 contains the phrase, "shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce . . ." (Emphasis added.) We interpret the word "revise" to mean either an upward or downward change in the tax rate. In interpreting statutes, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect whenever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). The plain and ordinary meaning of "revise" is "to look at or over again for the purpose of correcting or improving." See Webster's Third New International Dictionary. So a revision could be either upward or downward.

This conclusion is reinforced by various changes made by the General Assembly to Section 137.073. In 1985, the General Assembly substituted the word "revision" for the word "rollback" in the exception clause of the third sentence of subsection 5(2) of Section 137.073. In 1986, the General Assembly substituted the word "revision" for the word "rollback" in the first sentence of subsection 5(2). When the legislature has altered an existing statute such change is deemed to have an intended effect, and the legislature will not be charged with doing a meaningless act. State v. Sweeney, 701 S.W.2d 420 (Mo. banc 1985). These changes further reflect the legislative intent to

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allow a change upward as well as downward when referring to revisions in tax rates.

Therefore, we conclude that political subdivisions may revise their tax rates upward to the extent permitted by statute without a vote of the people, subject to the limitations discussed hereinafter.

#### General Reassessment

The second issue to be addressed is whether implementation of a biennial maintenance plan can also constitute a general reassessment. Section 137.073.1(1) defines general reassessment as follows:

137.073. Definitions -- revision of prior levy, when, procedure. -- 1. As used in this section, the following terms mean:

(1) "General reassessment", changes in value, entered in the assessor's books, of a substantial portion of the parcels of real property within a county resulting wholly or partly from reappraisal of value or other actions of the assessor or county equalization body or ordered by the state tax commission or any court.

Section 137.115 contains the following provision:

The provisions for setting and revising rates of levy under this section shall prevail in event of conflict with provisions of section 137.073 resulting from implementing an assessment and equalization maintenance plan in each odd-numbered year,  
...

(Emphasis added.)

With respect to setting and revising rates of levy, the provisions of Section 137.115 govern in event of conflict with Section 137.073. However, there is no provision indicating changes constituting a general reassessment as defined in Section 137.073, even if such changes are the result of implementing a biennial maintenance plan, cannot be a general reassessment. Therefore, it is our opinion that changes constituting a general reassessment as defined in Section

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137.073 are to be considered a "general reassessment" even if the changes are the result of implementing a biennial maintenance plan.

#### Tax Rates for Schools

The conclusion reached above is particularly meaningful because of the provision in Section 164.013, RSMo 1986, allowing school districts to adjust their Proposition C rollback for loss of revenue due to a decrease in the assessed valuation of real property as a result of general reassessment. Section 164.013 contains the following provision:

Loss of revenue due to a decrease in the assessed valuation of real property located within the school district as a result of general reassessment, and from state assessed railroad and utility distributable property shall be considered in lowering the rate of levy to comply with this section. ...

Having concluded above that changes in assessed valuation, if meeting the definition of Section 137.073.1(1), are a general reassessment even if the result of implementing a biennial maintenance plan, school districts can adjust their Proposition C rollback pursuant to Section 164.013.

Related to this issue is whether a school district can make such adjustment only in 1987 or can make such adjustment in 1987 and subsequent years as a result of a decrease in assessed valuation in 1987. It is our opinion that such adjustment in the Proposition C rollback can be made in 1987 and subsequent years. The applicable provision does not limit such adjustment to 1987 only. The statute uses the word "considered" which does not indicate any requirement of applying to one year only.

#### Levy Adjustments -- Conflict Between Section 137.115 and Section 137.073

The next issue concerns whether tax rates should be adjusted in accordance with the provisions in Section 137.073 or the provisions in Section 137.115. As pointed out previously, Section 137.115 provides that the provisions of Section 137.115 for setting and revising rates of levy shall prevail in event of conflict with the provisions of Section 137.073. Therefore, to the extent there is a conflict between Section 137.115 and

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Section 137.073 in adjusting tax rates, the provisions of Section 137.115 apply.

Limitation on Upward Revisions

In 1985 when the general reassessment occurred, political subdivisions were required to compute their permissible tax rates under the provisions set out in Section 137.073 and also under the provisions of Article X, Section 22 of the Missouri Constitution. In accordance with subsection 5(2) of Section 137.073, each political subdivision was limited in 1985 to levying the lower of rates calculated under these two tests. For example, in 1985 a county's permissible property tax rate for its General Revenue Fund under Section 137.073 may have been \$0.30 per \$100 assessed valuation and been \$0.34 per \$100 assessed valuation under Article X, Section 22. The political subdivision was permitted to levy in 1985 a maximum of \$0.30 per \$100 assessed valuation, the lower of the rates calculated under the two tests.

The final issue raised in your opinion requests concerns whether the tax rate calculated in 1985 under Article X, Section 22 of the Missouri Constitution can be exceeded in 1987 without a vote of the people. In the example above, can the tax rate exceed \$0.34 per \$100 assessed valuation without a vote of the people? It has been a long-standing policy of this office to not opine on the constitutionality of statutes. In addition, we are informed that litigation is being considered regarding this issue and this office does not issue opinions on matters where litigation is pending or threatened. Therefore, we must respectfully decline to opine upon the final issue raised in your opinion requests. See Gershman Investment Corporation v. Danforth, 517 S.W.2d 33 (Mo. banc 1974).

CONCLUSION

It is the opinion of this office that: (1) political subdivisions may revise their property tax rates upward to the extent permitted by statute without a vote of the people, subject to limitations discussed herein; (2) changes in assessed valuation constituting a general reassessment as defined in Section 137.073, RSMo 1986, are to be considered a general reassessment even if the changes are the result of implementing a biennial maintenance plan; (3) school districts can adjust their Proposition C rollback pursuant to Section 164.013, RSMo 1986, as discussed herein; and (4) to the extent there is a

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conflict between Section 137.115, RSMo 1986, and Section 137.073, RSMo 1986, in adjusting tax rates, the provisions of Section 137.115, RSMo 1986, apply. We do not opine on whether the maximum tax rate calculated in 1985 under Article X, Section 22 of the Missouri Constitution can be exceeded in 1987 without a vote of the people.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

## APPENDIX I

**137.115. Real and tangible personal property, assessment—equalization maintenance plan—assessor may mail forms—classes of property, assessment percentages.**—1. (1) All other laws to the contrary notwithstanding, the assessor or his deputies in all counties of this state including the city of St. Louis shall, between the first day of January and the first day of June, annually make a list of all real and tangible personal property taxable in his city, county, town or district and, except as otherwise provided in subsection 3 of this section, shall assess all personal property at thirty-three and one-third percent of its true value in money and all real property, including any new construction and improvements to real property, and possessory interests in real property at the percent of its true value in money set in subsection 5 of this section in the following manner: He shall call at the office, place of doing business, or residence of each person required by this chapter to list property, and require the person to make a correct statement of all taxable real property in the county owned by the person, or under his care, charge or management, and all taxable tangible personal property owned by the person or under his care, charge or management, taxable in the county; except that, beginning January 1, 1987, and every odd-numbered year thereafter, in order to maintain equalized assessed valuations, each county assessor shall appraise, equalize, and adjust the assessed valuation of all real property located within his county in accordance with a two-year assessment and equalization maintenance plan approved by the state tax commission. Each assessment and equalization maintenance plan shall encompass all necessary considerations for the implementation of the plan, shall be developed by the assessor and reviewed by the governing body of the county or St. Louis city and shall then be submitted, along with any comments or proposed alternatives of the governing body, to the state tax commission for its consideration, modification and approval. If the state tax commission fails to approve the plan within thirty days after the date submitted and if the state tax commission and the assessor and the governing body of the county involved are unable to resolve the differences within an additional thirty days, then the differences shall be submitted to the circuit court of the county involved for final resolution within an additional thirty days. The decision of the circuit court may be appealed pursuant to chapter 621, RSMo.

(2) Whenever changes in assessed valuation resulting from implementation of an assessment and equalization maintenance plan within the county are entered in the assessor's books, the county clerk in all counties and the assessor of

St. Louis city shall notify each political subdivision wholly or partially within the county or St. Louis city of the change in valuation, exclusive of new construction and improvements. Each political subdivision wholly or partially within the county or St. Louis city, including municipalities maintaining their own tax books, shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, exclusive of new construction and improvement, substantially the same amount of tax revenue as was produced in the previous year; provided that political subdivisions, except those wholly or partially in first class charter counties adjoining any city not within a county or any city not within a county may, upon action of the governing body, adjust the revised levy as provided by section 22 of article X of the constitution, provided that the consumer price index, as defined in subsection 5 of section 137.073, used in calculating tax rates under this section, shall not exceed five percent. Provided, however, that the governing body of each political subdivision wholly or partially within any first class charter county adjoining any city not within a county or any city not within a county may submit to the voters at any municipal, primary or general election a referendum to allow the levy in each odd-numbered year to be revised as required by section 22 of article X of the constitution, provided, that the consumer price index as defined in subsection 5 of section 137.073, using calculating tax rates under this section shall not exceed five percent. The ballot of submission shall contain but need not be limited to the following language:

Shall the ..... (governing body) of ..... (political subdivision) be allowed in any odd-numbered year to adjust the rate or rates of levy to increase the amount of the property tax revenue over the prior year as required in section 22, article X of the constitution, provided the percentage used for increased revenues shall not exceed five percent?

- YES  
 NO

If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then it shall be in effect. If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the governing body shall have no power to adopt and shall not resubmit the issue for at least two years. When setting its tax rates, each political subdivision opting to increase its tax revenues under this section shall include in the public notice required by sections 67.110 and 137.055, RSMo, the amount of tax revenue the proposed tax rates will produce above the prior year's revenue, and the equivalent tax rate. A referendum to repeal the proposal may be submitted to the voters by majority vote of the governing body of the political subdivision, or a petition containing

## APPENDIX I

the signatures of at least ten percent of the qualified voters voting in the last gubernatorial election who reside in that political subdivision. The provisions for setting and revising rates of levy under this section shall prevail in event of conflict with provisions of section 137.073 resulting from implementing an assessment and equalization maintenance plan in each odd-numbered year, and the revised rate determined under this section shall become the tax rate ceiling as defined under section 137.073 and such rate may be increased only in the manner provided by law and the constitution. The value of "new construction and improvements" shall include the additional assessed value of all improvements or additions to real property which were begun after and were not part of the prior year's assessment. The state auditor shall examine the revised levies and report his findings as to compliance with this section to the clerk of the county commission.

\* 2. Assessors in each county of this state and the city of St. Louis may send personal property assessment forms through the mail. \*

3. Grain and other agricultural crops in an unmanufactured condition shall constitute a separate class of tangible personal property and shall be assessed and valued for the purposes of taxation at one-half of one percent of their true value in money. Manufactured homes, as defined in section 700.010, RSMo, which are actually used as dwelling units, shall constitute a separate class of tangible personal property and shall be assessed and valued for the purposes of taxation at nineteen percent of their true value in money.

4. The person listing the property shall enter a true and correct statement of the property, in a printed blank prepared for that purpose. The statement, after being filled out, shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor.

5. For all tax years ending prior to January 1, 1985, all real property shall be assessed at thirty-three and one-third percent of its true value in money. For each tax year beginning on or after January 1, 1985, all subclasses of real property, as such subclasses are established in section 4(b) of article X of the Missouri Constitution and defined in section 137.016, shall be assessed at the following percentages of true value:

(1) For real property in subclass (1), nineteen percent;

(2) For real property in subclass (2), twelve percent; and

(3) For real property in subclass (3), thirty-two percent.

6. Manufactured homes, as defined in section 700.010, RSMo, which are actually used as dwelling units shall not be depreciated as personal property but they shall be valued the same as residential real property for the purpose of taxation.

7. Motor vehicles which are eligible for registration as and are registered as historic motor vehicles under section 301.131, RSMo, shall constitute a separate class of tangible personal property and shall be assessed and valued for the purposes of taxation at five percent of their true value in money.

(RSMo 1939 § 10950, A.L. 1945 p. 1782, § 10, A.L. 1951 p. 852, A.L. 1959 H.B. 108, A.L. 1972 H.B. 1175, A.L. 1973 H.B. 592, A.L. 1981 S.B. 13, A.L. 1983 S.B. 63, 60, 48, 65 & 71, A.L. 1985 S.B. 234, A.L. 1985 S.B. 152, A.L. 1986 S.B. 476)

Prior revisions: 1929 § 9756; 1919 § 12766; 1909 § 11348

\* Material between asterisks was omitted from original rolls due to an apparent drafting error.

## APPENDIX II

**137.073. Definitions—revision of prior levy, when, procedure.**—1. As used in this section, the following terms mean:

(1) "**General reassessment**", changes in value, entered in the assessor's books, of a substantial portion of the parcels of real property within a county resulting wholly or partly from reappraisal of value or other actions of the assessor or county equalization body or ordered by the state tax commission or any court;

(2) "**Preceding valuation factor**", a percentage increase or decrease based on the average of the annual percentage changes in total assessed valuation of a political subdivision over the previous three or five years, whichever is greater. The average shall not be less than zero. The percentage increase or decrease in a three- or five-year period shall be adjusted to eliminate the effect, as near as possible, of increases or decreases in assessed valuation resulting from boundary changes, properties changing from local to state assessment jurisdiction, blanket assessment changes, general reassessment and state tax commission ordered changes occurring in the previous three or five years; For school districts, an additional adjustment shall be made to reflect effects of increases or decreases

in state assessed valuation in the county—in the proportion the revenue yield from state assessed valuation has been to total property tax yield from all property in each school district—in calculating the preceding valuation factor;

(3) "**Tax rate**", "**rate**", or "**rate of levy**", singular or plural, includes the tax rate for each purpose of taxation of property a taxing authority is authorized to levy without a vote and any tax rate authorized by election, including bond interest and sinking fund;

(4) "**Tax rate ceiling**", a tax rate as revised or reduced by the taxing authority to comply with the provisions of this section or when a court has determined the tax rate reduction. This is the maximum tax rate that may be levied in the year of tax rate revision or reduction and in subsequent years, unless a higher tax rate ceiling is approved by voters of the political subdivision as provided in this section;

(5) "**Tax revenue**", when referring to the previous year, means the actual receipts from ad valorem levies on all classes of property, including state assessed property, in the immediately preceding fiscal year of the political subdivision, plus an allowance for taxes billed but not collected in the fiscal year and plus an additional allowance for the revenue which would have been collected from property which was annexed by such political subdivision but which was not previously used in determining tax revenue under this section. Any political subdivision which annexed property during 1985 and did not adjust the levy to allow for additional revenues from the annexed area may recalculate its tax rate ceiling and adjust the levy upward to the extent necessary to produce revenues which would have been collected on the assessed value of the annexed area at the rate imposed during the preceding year. The term "**tax revenue**" shall not include any receipts from ad valorem levies on any property of a railroad corporation or a public utility, as these terms are defined in section 386.020, RSMo, which was assessed by the assessor of a county or city in the previous year but is assessed by the state tax commission in the current year. All school districts and those counties levying sales taxes under chapter 67, RSMo, shall include in the calculation of tax revenue an amount equivalent to that by which they reduced property tax levies as a result of sales tax under sections 67.505 and 164.013, RSMo, in the immediately preceding fiscal year but not including any amount calculated to adjust for prior years. For purposes of political subdivisions which were authorized to levy a tax in the year prior to general reassessment but which did not levy such tax, the term "**tax revenue**", as used in relation to the reduction or revision of tax levies mandated by law

## APPENDIX II

for the year of general reassessment or a subsequent year, shall mean that amount which such political subdivisions would have received in their fiscal year which included or ended on December thirty-first of the year prior to general reassessment had they levied the tax they were authorized to levy in that same fiscal year.

2. Whenever changes in assessed valuation that result from a general reassessment of real property within the county are entered in the assessor's books, the county clerk in all counties and the assessor of St. Louis city shall notify each political subdivision wholly or partially within the county of the change in valuation, and each political subdivision wholly or partially within the county, including municipalities maintaining their own tax books, shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, including state assessed property, substantially the same amount of tax revenue as was produced in the previous year and, in addition thereto, a percentage of the previous year's revenues equal to the preceding valuation factor of the political subdivision.

3. Whenever the assessed valuation of real or real and personal property combined within a political subdivision or taxing authority has increased by ten percent or more over the prior year's valuation by action other than a general reassessment, the political subdivision or taxing authority shall immediately revise and lower the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, including state assessed property, substantially the same amount of tax revenue as set forth in estimates filed by school districts for the current year as required by section 164.011, RSMo, or as estimated in the annual budget for the fiscal year adopted in accordance with chapters 50 and 67, RSMo, by political subdivisions other than school districts. The lower rate of levy as determined by the taxing authority, or when a court has determined the tax rate reduction, shall then be recertified to the county clerk.

4. (1) Where the taxing authority is a school district, it shall only be required hereby to revise and lower the rates of levy to comply with subsections 2 and 3 of this section to the extent necessary to produce from all taxable property, including state assessed railroad and utility property, which shall be separately estimated in addition to other data required in complying with section 164.011, RSMo, substantially the amount of tax revenue permitted in subsections 2 and 3. In the year following tax rate reduction, the tax rate ceiling may be adjusted to offset such district's reduction in the

apportionment of state school moneys due to its reduced tax rate. However, in the event any school district in calculating a tax rate ceiling pursuant to this section, requiring the estimating of effects of state assessed railroad and utility valuation or loss of state aid, discovers that the estimates used result in receipt of excess revenues, which would have required a lower rate if the actual information had been known, the school district shall reduce the tax rate ceiling in the following year to compensate for the excess receipts, and the recalculated rate shall become the tax rate ceiling for the tax rate. Notwithstanding other provisions of law, tax rates for public schools or libraries may be reduced, pursuant to this section, below rates established as minimal entitlement levels for participation in state aid funds without loss in such entitlement.

(2) For a political subdivision authorized to submit new or increased tax levies to their voters by legislation adopted in 1985, or in any year in which general reassessment occurs in the county containing the major portion of the political subdivision, the subdivision may levy the full amount authorized by such laws on approval of the vote required by the law and the tax rate ceiling of such political subdivision may be increased to recognize the voted increase.

(3) For a political subdivision revising a tax rate in a year of general reassessment which experiences a reduction in the amount of assessed valuation for that year, due to decisions of the state tax commission or a court under sections 138.430 to 138.433, RSMo, or due to clerical errors or corrections in the calculations or recalculation of any assessed valuation:

(a) Such political subdivision may revise the tax rate ceiling for each purpose it levies taxes to compensate for the reduction in assessed value occurring after the political subdivision calculated the tax rate ceiling in the year of general reassessment, for purposes of taxes levied in the year following general reassessment and subsequent years. Such revision by the political subdivision shall be made at the time of the next calculation of the tax rate after the reduction in assessed valuation has been determined;

(b) In addition, only in the year following the reduction in assessed valuation as a result of circumstances defined in subdivision (3) of subsection 4 of this section, such political subdivision may levy a tax rate for each purpose it levies taxes above the tax rate ceiling adjustment provided in paragraph (a) of this subdivision to recoup any revenues it was entitled to receive for the prior year;

## APPENDIX II

(c) Provided, any adjustments in tax rates and tax rate ceilings permitted by this subdivision shall not exceed a rate limit specified in statute or the constitution or levels previously approved by voters.

5. (1) In order to implement the provisions of section 22 of article X of the Constitution of Missouri, each county assessor shall maintain a record of property valuations in such a manner as to identify each year the increase in valuation for each political subdivision in the county as a result of "new construction and improvements".

In addition, the state tax commission shall certify each year to each county clerk the increase in the general price level as measured by the Consumer Price Index for All Urban Consumers for the United States, or its successor publications, as defined and officially reported by the United States Department of Labor, or its successor agency. The state tax commission shall certify the increase in such index on the latest twelve-month basis available on July first of each year over the immediately preceding prior twelve-month period in order that political subdivisions shall have this information available in setting their tax rates according to law and section 22 of article X of the Constitution of Missouri. For purposes of implementing the provisions of section 22 of article X of the Missouri Constitution, the term "property", as used in that constitutional section, shall mean all taxable property, including state assessed property.

(2) Each political subdivision required to revise rates of levy by subsections 2 and 3 of this section or section 22 of article X of the Constitution of Missouri shall calculate each tax rate it is authorized to levy and, in establishing each tax rate, shall consider each provision for tax rate revision or reduction, provided in this section and section 22 of article X of the Constitution of Missouri, separately and without regard to annual tax rate reductions provided in sections 67.505 and 164.013, RSMo. Each political subdivision shall set each tax rate it is authorized to levy using the calculation that produces the lowest tax rate ceiling. It is further the intent of the general assembly, under the authority of section 10(c) of article X of the Constitution of Missouri, that the provisions of this section be applicable to tax rate reductions or revisions mandated under section 22 of article X of the Constitution of Missouri as to reestablishing tax rates as reduced or revised in subsequent years, enforcement provisions, and other provisions not in conflict with section 22 of article X of the Constitution of Missouri; except that, in calculating tax rates in the year subsequent to a tax reduction or revision under section 22 of article X of the Constitution of Missouri, a school district may modify its tax rate ceiling in such a

manner as to recapture any loss in state school aid occasioned by establishing its tax rate ceiling as required by section 22 of article X of the Constitution of Missouri. Annual tax rate reductions provided in sections 67.505 and 164.013, RSMo, shall be applied to the tax rate as established under this section and section 22 of article X of the Constitution of Missouri. In the year of general reassessment, the tax rate ceiling, as calculated under this section, of each political subdivision may be increased as follows:

(a) For political subdivisions in which the voters thereof approved an increase in the rate of levy which was advertised, in writing or by publication, or both, by the political subdivision as being based on assessed valuations in the year of general reassessment, the total increase in the rate of levy so approved by the voters of such political subdivision;

(b) For political subdivisions not included in paragraph (a) of this subdivision, the tax rate ceiling of such political subdivisions shall be increased by an amount which will generate the same amount of tax revenues as the increase approved by the voters of the political subdivision would have generated if such increase had been included in the rate of levy imposed in the year prior to general reassessment.

6. (1) In all political subdivisions except school districts, the tax rate ceiling established pursuant to this section shall not be exceeded in the year of the tax rate reduction or thereafter unless a higher tax rate is approved by a vote of the people. Approval of the higher tax rate shall be by at least a majority of votes cast, except:

(a) When a higher tax rate, before reduction, would have required approval by at least two-thirds of the votes cast, any vote to exceed the tax rate ceiling shall require approval by at least two-thirds of the votes cast;

(b) When a higher tax rate, before reduction, could have been approved by a majority of the votes cast, the maximum tax rate increase that can be approved by a majority after reduction shall be computed as follows: The maximum cumulative percent the original tax rate ceiling can be increased by a majority vote in the future shall be the same percent which the tax rate prior to reduction was exceeded by the maximum tax rate that could be voted by a majority; and

(c) When a higher tax rate, before reduction, would have required approval of the governing body without approval of voters, the tax rate ceiling may be increased by action of the governing body in years following reduction, by the same percentage the rate could have been increased without approval of the voters before

## APPENDIX II

the tax rate was reduced. For this purpose any political subdivision that before general reassessment had eliminated its tax rate shall be deemed to have been levying one cent per one hundred dollars valuation before general reassessment.

(2) When the voters approve an increase in the tax rate, the increased tax rate becomes the new tax rate ceiling.

(3) The governing body of any political subdivision except a school district may levy a tax rate lower than its tax rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling without voter approval.

7. (1) In all school districts, tax rates reduced or revised pursuant to this section or section 22 of article X of the Missouri Constitution or when a court has determined and ordered the tax rate reduction, or revision, may be increased, in increments or otherwise:

(a) Above the tax rate set as a result of such reduction or revision, up to and including the rate in effect on November 4, 1980, or up to and including a higher rate adopted after November 4, 1980, in the manner authorized by law, by the approval of a majority of the qualified voters of the school district voting on the proposition; provided that, the provisions of this subdivision shall apply only if the tax rates, after the increase, will be three dollars seventy-five cents or less;

(b) Above the rate in effect on November 4, 1980, or above a higher rate adopted after November 4, 1980, in the manner authorized by law, or above three dollars seventy-five cents, only by the approval of that majority of the qualified voters of the school district voting on the proposition as required by section 11(c) of article X of the Missouri Constitution.

(2) The governing body of any school district may levy a tax rate lower than its tax rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling, without voter approval. As used in this subdivision, the term "tax rate ceiling" shall also include any reductions mandated by section 164.013, RSMo.

8. Each taxing authority proposing to levy a tax rate in any year shall notify the clerk of the county commission in the county or counties where the tax rate applies of its tax rate ceiling and its proposed tax rate. Any taxing authority whose tax rate ceiling has changed from the previous year shall provide data, in such form as shall be prescribed by the state auditor by rule, substantiating such change complies with Missouri law. In addition, each taxing authority proposing to levy a tax rate for debt service shall provide data, in such form as shall be pre-

scribed by the state auditor by rule, substantiating the tax rate for debt service complies with Missouri law. The county clerk shall keep on file and available for public inspection all such information for a period of three years. The clerk shall, within three days of receipt, forward a copy of the notice of a taxing authority's tax rate ceiling and proposed tax rate and any substantiating data to the state auditor. The state auditor shall examine such information and return to the county clerk his findings as to compliance of the tax rate ceiling with this section and as to compliance of any proposed tax rate for debt service with Missouri law. The county clerk shall forward a copy of the auditor's findings to the taxing authority and shall file a copy of the findings with the information received from the taxing authority. The auditor's findings are advisory for the information of the taxing authority and the public.

9. No tax rate shall be extended on the tax rolls by the county clerk unless the political subdivision has complied with the foregoing provisions of this section.

10. Whenever a taxpayer has cause to believe that a taxing authority has not complied with the provisions of this section, the taxpayer may make a formal complaint with the prosecuting attorney of the county. Where the prosecuting attorney fails to bring an action within ten days of the filing of the complaint, the taxpayer may bring a civil action under this section and institute an action as representative of a class of all taxpayers within a taxing authority if the class is so numerous that joinder of all members is impracticable, if there are questions of law or fact common to the class, if the claims or defenses of the representative parties are typical of the claims or defenses of the class, and if the representative parties will fairly and adequately protect the interests of the class. In any class action maintained under this section, the court may direct to the members of the class a notice to be published at least once each week for four consecutive weeks in a newspaper of general circulation published in the county where the civil action is commenced and in other counties within the jurisdiction of a taxing authority. The notice shall advise each member that the court will exclude him from the class if he so requests by a specified date, that the judgment, whether favorable or not, will include all members who do not request exclusion, and that any member who does not request exclusion may, if he desires, enter an appearance. In any class action brought under this section the court, in addition to the relief requested, shall assess against the taxing authority found to be in violation of this section the reasonable costs of bringing the action, including reasonable at-

## APPENDIX II

torney's fees, provided no attorney's fees shall be awarded any attorney or association of attorneys who receive public funds from any source for their services. Any action brought pursuant to this section shall be advanced to the top of the circuit court's civil docket, and shall be set for hearing as soon as practicable after the cause is at issue.

11. If in any action, including a class action, the court issues an order requiring a taxing authority to revise and lower the tax rates as provided in this section or enjoins a taxing authority from the collection of a tax because of its failure to revise and lower the rate of levy as provided in this section, any taxpayer paying his taxes when an improper rate is applied has erroneously paid his taxes in part, whether or not the taxes are paid under protest as provided in section 139.031, RSMo. The part of the taxes paid erroneously is the difference in the amount produced by the original levy and the amount produced by the revised and lowered levy. The township or county collector of taxes or the collector of taxes in any city shall refund the amount of the tax erroneously paid. The taxing authority refusing to revise and lower the rate of levy as provided in this section shall make available to the collector all funds necessary to make refunds under this subsection. No taxpayer shall receive any interest on any money erroneously paid by him under this subsection.

(L. 1955 p. 835 § 1, A.L. 1979 S.B. 247, 333 & 254, A.L. 1984 H.B. 1254, A.L. 1985 S.B. 234, A.L. 1985 H.B. 463, A.L. 1985 S.B. 152, A.L. 1986 H.B. 1022, et al.)

Effective 6-20-86



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
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June 4, 1987

OPINION LETTER NO. 51-87

The Honorable W. O. "Bob" Howard  
Representative, District 16  
State Capitol Building, Room 412  
Jefferson City, Missouri 65101

Dear Representative Howard:

FILED  
51

This opinion letter is in response to your questions asking:

(1) Is the Mayor afforded authority to look at any record of the city, for any reason, including the Daily Log Book of the city police department with the exception of felony or juvenile offenses?

(2) Does the Mayor of a municipality have the power to remit fines and forfeitures and to grant reprieves and pardons for offenses arising under the ordinances of the city?

We understand the city about which you are concerned is a third class city operating under the provisions of Chapter 77, RSMo. Therefore, we will treat your questions as only relating to such third class cities. Likewise, with respect to your first question, we understand your primary concern to be the authority of the mayor to look at the daily log book maintained by the city police department. We will confine our discussion to the mayor's authority to look at such daily log book. As suggested by your first question, we will not address records relating to juveniles.

With respect to your first question, Section 77.250, RSMo 1986, provides in part:

He [the mayor] shall have the superintending control of all the officers and affairs of the city, and shall take care that the

The Honorable W. O. "Bob" Howard

ordinances of the city and the state laws relating to such city are complied with.

Section 77.350, RSMo 1986, provides in part:

The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, . . .

Subsection 2 of Section 85.561, RSMo 1986, provides:

2. The chief of police shall, in the discharge of his duties, be subject to the orders of the mayor only; the deputy chief of police and all other members of the police department shall be subject to the orders of their superiors in the police department and the mayor only.

Your opinion request does not state what matters are contained in the daily log book maintained by the city police department so we will address your question in general terms. Sections 77.250, 77.350 and 85.561 provide for the mayor to have superintending control of all officers and affairs of the city, be active and vigilant in enforcing laws and ordinances for the government of the city, and for the chief of police to be subject to the orders of the mayor. Based upon these provisions, the mayor generally has access to records such as the daily log book maintained by the city police department. Normally, his motivation for looking at an official record is irrelevant if he has authority to have access to that record. It is not his examination of the record that would be the illegal act but, if he used the information obtained from the record for illegal purposes, it would be that use which would be illegal. See, for example, Section 576.050, RSMo 1986.

On the other hand, the purpose of his looking at a record would be relevant in regard to arrest records which are closed under Sections 610.100 to 610.120, RSMo 1986.

Section 610.100, RSMo 1986, provides:

If any person is arrested and not charged with an offense against the law within thirty days of his arrest, official records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records except as provided in section 610.120.

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Section 610.105, RSMo 1986, provides:

If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in section 610.120.

Section 610.120, RSMo 1986, provides in part:

Records required to be closed shall not be destroyed; they shall be inaccessible to the general public and to all persons other than the defendant except as provided in this section. They shall be available only to courts, administrative agencies, law enforcement agencies, and federal agencies for purposes of prosecution, litigation, sentencing, parole consideration and to federal agencies for such investigative purposes as authorized by law or presidential executive order. . . ."

(Emphasis added.)

As to records covered by Sections 610.100 to 610.120, the mayor could be considered to be a person from a "law enforcement agency" as that term is used in Section 610.120 since Section 77.350 gives him the responsibility of enforcing all laws and ordinances for the government of his city and Section 85.561 makes the chief of police subject to the orders of the mayor. However, the mayor may look at these records only "for purposes of prosecution, litigation, sentencing, parole consideration . . .".

As for your second question, it is answered by Section 77.360, RSMo 1986, which provides:

The mayor shall have power to remit fines and forfeitures and to grant reprieves and pardons for offenses arising under ordinances of the city; but this section shall not be so construed as to authorize the mayor to remit any costs which may have accrued to any officer of the city by reason

The Honorable W. O. "Bob" Howard

of any prosecution under the laws or  
ordinances of said city.

Under that section, the answer to your second question is yes. See, also, Missouri Attorney General Opinion Letter No. 207, Smith, 1980, a copy of which is enclosed.

In summary, it is the opinion of this office that the mayor of a third class city operating under the provisions of Chapter 77, RSMo 1986, has the authority to look at the daily log book maintained by the city police department. In regard to closed arrest records to which Sections 610.100 to 610.120, RSMo 1986, are applicable, the mayor may look at such closed arrest records only for purposes of prosecution, litigation, sentencing and parole consideration. The mayor of such third class city has the power to remit fines and forfeitures and to grant reprieves and pardons for offenses arising under ordinances of the city.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure

Opinion Letter No. 207, Smith, 1980



ATTORNEY GENERAL OF MISSOURI

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65102

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September 4, 1987

OPINION LETTER NO. 52-87

The Honorable Edward E. Quick  
Senator, District 17  
State Capitol Building, Room 421  
Jefferson City, Missouri 65101

FILED  
52

Dear Senator Quick:

This opinion letter is in response to your request for our interpretation of the meaning of certain language in Section 260.805, RSMo 1986. In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983).

Section 260.805 is one of four sections enacted by Senate Bill No. 754, 83rd General Assembly, Second Regular Session, entitled "An Act Relating to Waste to Energy Facilities". Such section provides:

260.805. Electric suppliers to purchase electricity generated, rate allowable.--When any portion of a waste to energy facility is owned, operated or leased by a governing body, the electrical supplier serving the area shall be required to enter into long-term contracts to purchase the electricity generated by the waste to energy facility at the same rate the utility charges the governing body for energy used. Provided, however, that the rate paid by the electric supplier for such energy shall be such that no other customer class or classes shall ever directly or indirectly subsidize any part of the cost of owning, operating or maintaining the trash to energy facility, unless they receive a direct or indirect benefit.

The Honorable Edward E. Quick

Your first question asks:

In the first sentence of Section 260.805, RSMo, does the phrase "the same rate the utility charges the governing body for energy used," mean the total charges from the utility to the governing body for electricity purchased from the utility including the rates for electric capacity which vary with the time of purchase, and the rate for electric energy actually consumed?

We answer in the affirmative. The word "energy" appears no fewer than five times in Section 260.805. We believe that in each instance the word "energy" is used as a synonym for "electricity". Therefore, we believe that the quoted excerpt from the first sentence in Section 260.805 means the same rate (price) that the utility charges the governing body for electricity used by the governing body.

Your second question asks:

In the second sentence of Section 260.805, RSMo, what is meant by the phrase "directly or indirectly subsidize any part of the cost of owning, operating or maintaining the [waste] to energy facility?"

We believe that the quoted excerpt from the second sentence in Section 260.805, when considered in the context of the language immediately preceding it and immediately following it, means that no other customer class or classes shall ever be required to pay a higher price for electricity in order to pay for any part of the cost of owning, operating or maintaining a waste to energy facility, unless they receive a direct or indirect benefit from it.

Your third question asks:

Finally, in the second sentence of Section 260.805, RSMo, does the phrase "direct or indirect benefits [sic]" to other customers or classes of customers include the societal benefits of more efficiently, economically and environmentally benignly treating wastes generated by residents of Missouri as the true test of whether such customers or classes of customers receive a direct or

The Honorable Edward E. Quick

indirect benefit from the waste to energy facility?

We answer in the negative. We do not believe that the societal benefit of more efficient, economical or environmentally benign treatment of wastes generated by residents of Missouri is the kind of "direct or indirect benefit" contemplated by the concluding clause in Section 260.805. By prohibiting subsidization of a waste to energy facility by customers or customer classes unless they receive a direct or indirect benefit from the facility, the second sentence in Section 260.805 recognizes that not all customers and customer classes will receive such a benefit. To conclude that all customers and customer classes of an electric utility will receive a benefit merely from the presence of a waste to energy facility at some location within the utility's service area would require the corollary conclusion that the second sentence in Section 260.805 was included with the intent that it should be wholly superfluous and without any purpose whatsoever, an intent we are unwilling to ascribe to the lawmakers. Unless a statute is incongruous or unintelligible, a court may not insert words into it nor delete words, for a court cannot presume that the legislature intended to use superfluous or meaningless words. Welborn v. Southern Equipment Company, 386 S.W.2d 432, 436 (Mo.App. 1964).

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

COUNTIES: The county commission in a third  
COUNTY COMMISSIONS: class county has the authority under  
COUNTY COURTHOUSE: Section 49.265, RSMo 1986, to require  
COUNTY OFFICES: all county offices, except the  
sheriff's office, to be open five and  
one-half days each week; therefore, such county commission has  
the authority to require county offices, except the sheriff's  
office, to be open Saturday mornings after being open Monday  
through Friday during regular working hours. The county  
commission may require any office to be open six days a week  
when the public convenience so requires.

June 4, 1987

OPINION NO. 55-87

The Honorable Delbert L. Scott  
Representative, District 118  
State Capitol Building, Room 103B-C  
Jefferson City, Missouri 65101



Dear Representative Scott:

This opinion is in response to your question asking:

Does the county commission in a 3rd class  
county have the authority to require county  
elected office-holders to attend and open  
their office in the courthouse on Saturday  
morning, after they have been open during  
regular working hours Monday-Friday?

Section 49.265, RSMo 1986, provides:

The county commission in all counties of  
class two, by order entered of record, may  
authorize all county offices, except the  
sheriff's office, to be open not more than  
five days each week, and in all counties of  
classes three and four by order entered of  
record, may authorize all county offices,  
except the sheriff's office, to be open not  
more than five and one-half days each week.  
The county commission, after entering such  
an order, may require any office to be open  
six days a week when public convenience  
requires. The authorization by the county  
commission in counties of the third and

The Honorable Delbert L. Scott

fourth class to close such offices must be published three times in the county newspapers and such authorization to be signed by the county commission.

The primary object of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent, and in so doing the words used are to be considered in their plain and ordinary meaning.

Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599 (Mo. 1983). Section 49.265 gives the county commission in a third class county the authority to require that all county offices, except the sheriff's office, be open not more than five and one-half days each week. By this language, the county commission has the authority to require that county offices, except the sheriff's office, be open five and one-half days each week. Being open five and one-half days could include Monday through Friday, during regular working hours, and Saturday morning. The county commission may require any office to be open six days a week when the public convenience so requires.

Before Section 49.265 was amended in 1959 by House Bill No. 534, Seventieth General Assembly, such section provided:

The county court in all counties of class two, by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five days each week. The county court, after entering such an order, may require any office to be open six days a week when public convenience requires.

By enacting House Bill No. 534 in 1959, the legislature apparently intended that county offices, except the sheriff's office, in third and fourth class counties, could be required to be open five and one-half days each week.

Outside the management of the fiscal affairs of the county, county courts (county commissions) possess no powers except those conferred by statute. State ex rel. Floyd v. Philpot, 364 Mo. 735, 266 S.W.2d 704, 710 (Mo. banc 1954). In this instance, the county commission has the authority under Section 49.265 to require all county offices, except the sheriff's office, to be open five and one-half days each week.

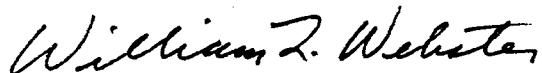
The Honorable Delbert L. Scott

One aspect of your question is whether the elected officeholder can be required to be present on Saturday mornings. The applicable statute simply provides for the office to be open. Whether the elected officeholder or an employee is present would be within the discretion of the elected officeholder.

CONCLUSION

It is the opinion of this office that the county commission in a third class county has the authority under Section 49.265, RSMo 1986, to require all county offices, except the sheriff's office, to be open five and one-half days each week; therefore, such county commission has the authority to require county offices, except the sheriff's office, to be open Saturday mornings after being open Monday through Friday during regular working hours. The county commission may require any office to be open six days a week when the public convenience so requires.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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April 28, 1987

OPINION LETTER NO. 58-87

The Honorable Phil B. Curls  
Senator, District 9  
State Capitol Building, Room 219  
Jefferson City, Missouri 65101

FILED  
58

Dear Senator Curls:

This opinion is in response to your question regarding tax abatement in an enterprise zone. You state your question as follows:

One of my constituents is attempting to construct housing for low and moderate income persons in an area already designated under State law as an Enterprise Zone.

Assuming the development otherwise qualifies, what is the maximum amount of tax abatement which the governing City authority (the Kansas City, City Council) is authorized to award?

\* \* \*

My constituent believes this statute [Section 135.215, RSMo 1986] allows tax abatement in certain qualified enterprise zone projects greater than that allowed under Chapter 353 alone. Under the Enterprise Zone Law, the City appears to have discretion to allow up to full 100% tax abatement for the full 25 years. And the City is required to give at least 50% abatement for the first 10 years. Under Chapter 353, there is no such minimum abatement requirement.

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Article X, Section 7 of the Missouri Constitution authorizes the legislature to provide for partial relief from taxation of certain obsolete, decadent or blighted areas. Such section provides:

For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment, and rehabilitation of obsolete, decadent, or blighted areas, the general assembly by general law may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe; provided, however, that in the case of forest lands, the limitation of twenty-five years herein described shall not apply.

Section 135.215, RSMo 1986, implements the above-quoted constitutional provision and permits certain tax abatement for areas declared to be enterprise zones. Such section provides:

The provisions of chapter 353, RSMo, notwithstanding, upon the designation of any enterprise zone pursuant to section 135.210, all subsequent improvements to real property encompassed thereby which is owned by a revenue producing enterprise as defined in subdivision (5) of section 135.200 shall become and remain exempt from assessment and payment of ad valorem taxes of any political subdivision of this state, or municipality thereof, to the same extent, upon the same terms and conditions and subject to the same discretion of the governing authority as would otherwise apply to property belonging to an urban redevelopment corporation pursuant to the provisions of section 353.110, RSMo, except that at least fifty percent of such ad valorem taxes must be abated for at least the first ten years of such designation, and that all such exemptions shall be removed no later than twenty-five years after such designation. In addition to the exemption from taxation

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for subsequent improvements set forth in this section, when real property within the zone changes ownership, the exemption from taxation shall continue to be in force and effect for any real property improvements made by the prior owner.

(Emphasis added.)

Section 353.110, RSMo 1986, relating to urban redevelopment corporations, provides in part as follows:

1. Once the requirements of this section have been complied with, the real property of urban redevelopment corporations acquired pursuant to this chapter shall not be subject to assessment or payment of general ad valorem taxes imposed by the cities affected by this law, or by the state or any political subdivision thereof, for a period not in excess of ten years after the date upon which such corporations become owners of such real property, . . .

2. . . . For the next ensuing period not in excess of fifteen years, ad valorem taxes upon such real property shall be measured by the assessed valuation thereof as determined by such assessor or assessors upon the basis of not to exceed fifty percent of the true value of such real property, including any improvements thereon, nor shall such valuations be increased above fifty percent of the true value of such real property from year to year during such next ensuing period so long as the real property is owned by an urban redevelopment corporation and used in accordance with an authorized development plan. After a period totaling not more than twenty-five years, such real property shall be subject to assessment and payment of all ad valorem taxes, based on the full true value of the real property; . . .

(Emphasis added.)

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Senate Committee Substitute for House Substitute for House Committee Substitute for House Bill No. 1327, Eighty-Third General Assembly, Second Regular Session, became effective on August 13, 1986. It repealed Section 353.110, RSMo 1978, and Section 99.700, RSMo Supp. 1984, relating to urban redevelopment corporations and enacted in lieu thereof two new sections relating to the same subject. Among other matters, the Missouri General Assembly inserted the phrase "not in excess" in the first sentence of Section 353.110.1 before the words "of ten years". In addition, in the second sentence in subsection 2 of Section 353.110, the Missouri General Assembly inserted the phrase "not in excess" before the words "of fifteen years". Lastly, in the third sentence of subsection 2 of Section 353.110, the Missouri General Assembly substituted the phrase "a period totaling not more than" for the phrase "said period totaling" before the words "twenty-five years". Such changes make it clear that the tax abatement under Section 353.110 can be for less than twenty-five (25) years.

Statutes in pari materia must be read and construed together in order to keep all provisions of law on the same subject in harmony so as to work out and accomplish the central idea and intent of the law-making branch of state government. State ex rel. Day v. County Court of Platte County, 442 S.W.2d 178 (Mo.App. 1969). It is our opinion that the provisions of Section 135.215, RSMo 1986, authorize tax abatement in accordance with the terms and conditions of Section 353.110, with certain exceptions. In this regard, the tax abatement under the provisions of Section 135.215 applies only to improvements made after the designation of the enterprise zone and applies only to subsequent improvements. In addition, at least fifty percent (50%) of the taxes on subsequent improvements must be abated for at least the first ten (10) years of such designation. However, in view of the legislative changes in Section 353.110, it is possible for a governing body to grant tax abatement for less than twenty-five (25) years, but not more than twenty-five (25) years after such designation. As a result, the provisions of Section 135.215 provide only for a minimum abatement. Lastly, the duration of the tax abatement is calculated from the date of the designation of the enterprise zone. Therefore, with the exceptions noted above, we conclude that the tax abatement provisions of Section 353.110, RSMo 1986, are controlling and the provisions of Section 135.215, RSMo 1986, do not permit tax abatement in excess of that permitted under the provisions of Section 353.110, RSMo 1986.

We understand there is no dispute covering the tax abatement during the first ten-year period. This brings us to

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the question of what is the maximum permissible tax abatement under Section 353.110 for the last fifteen-year period. With respect to this question, the relevant provision in Section 353.110.2 provides:

For the next ensuing period not in excess of fifteen years, ad valorem taxes upon such real property shall be measured by the assessed valuation thereof as determined by such assessor or assessors upon the basis of not to exceed fifty percent of the true value of such real property, including any improvements thereon, nor shall such valuations be increased above fifty percent of the true value of such real property from year to year during such next ensuing period so long as the real property is owned by an urban redevelopment corporation and used in accordance with an authorized development plan. . . .

(Emphasis added.)

The plain meaning of statutory language is to be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). The words "not to exceed" indicate that an assessed valuation below such amount would be in compliance with the statute. The assessed valuation could be zero; in effect, an abatement of 100 percent.

Therefore, it is our opinion that the governing body of the city may, in its discretion, grant a tax abatement in an enterprise zone for the last fifteen-year period to a maximum of 100 percent of property taxes on subsequent improvements to real property.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

June 4, 1987

OPINION LETTER NO. 59-87

Timothy W. Perigo  
Prosecuting Attorney  
Newton County Courthouse  
Neosho, Missouri 64850

Dear Mr. Perigo:

FILED  
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This opinion letter is in response to your question asking:

As the City of Joplin continues to extend its city limits into Newton County, does the Newton County Ambulance District, Redings Mill Fire Protection District, and City-County Library of Newton County continue to receive property taxes from the new Joplin residents?

The property taxes imposed by each of the taxing entities referred to in your question will be considered separately below.

### City-County Library District of Neosho-Newton County

The applicable statute dealing with libraries is Section 182.480, RSMo 1986, which states:

As of October 13, 1965, and any other provisions of law to the contrary notwithstanding, all of the area or territory included within the geographical boundaries of a city, including any area or territory which becomes a part of any city pursuant to any annexation pending on October 13, 1965, which maintains a free public library supported at least in part by taxation, shall be a "municipal library district" and shall have as its purpose the furnishing of

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free public library services to residents of the district, and the district shall be known as "The city of ..... Municipal Library District", and each such district shall be a political subdivision of the state of Missouri and a body corporate with all the powers and rights of like or similar corporations, and as of the effective date of sections 182.130 and 182.480 to 182.510, all of the area or territory which is hereby included within a municipal library district shall be excluded from the boundaries of any existing county library district, and all of the taxable property located in the municipal library district shall only be subject to taxation by the municipal library district and shall hereafter not be subject to taxation by the county library district; provided, however, that after October 13, 1965, any annexation by a city having within its boundaries a municipal library district shall not extend the boundaries of the municipal library district, and any annexed areas shall remain in the county library district, and the taxable property in any such annexed areas shall only be subject to taxation by the county library district and shall not be subject to taxation by the municipal library district; except, that in any county not having a county library any such annexation shall likewise extend the boundaries of any existing municipal library district.

(Emphasis added.)

As set forth in the provision highlighted above by underlining, boundaries of municipal library districts cannot be extended into areas already designated as county library districts. Property originally within the county library district remains a part of that county library district with all such property being subject to taxation by the county library district alone. As such, the addition of an area to the City of Joplin does not alter the relationship between such area and the City-County Library District of Neosho-Newton County nor does it make such area subject to taxation by the library located within the City of Joplin. See also Missouri Attorney General Opinion No. 207, Proffer, 1972, a copy of which is enclosed.

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Redings Mill Fire Protection District

The impact of the addition of an area to the City of Joplin upon taxation by the Redings Mill Fire Protection District depends upon the population of the City of Joplin.

Section 321.320, RSMo 1986, states:

If any property, located within the boundaries of a fire protection district, is included within a city having a population of forty thousand inhabitants or more, which city is not wholly within the fire protection district, and which city maintains a city fire department, the property is excluded from the fire protection district.

If the population of the City of Joplin is 40,000 or more and is not wholly within the fire protection district and it maintains its own fire department, then such area would no longer be within or subject to taxation by the Redings Mill Fire Protection District.

If, however, the population of the City of Joplin is less than 40,000 but greater than 5,000, the applicable statute is Section 321.322, RSMo 1986, which provides in part:

1. If any property located within the boundaries of a fire protection district shall be included within a city having a population of at least five thousand but not more than forty thousand which is not wholly within the fire protection district and which maintains a city fire department, one-fifth of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on January first of the first calendar year occurring after the date on which the property was included within the city or after September 28, 1985, whichever later occurs; two-fifths of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on January first of the second calendar year occurring after the date on which the

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property was included within the city or after September 28, 1985, whichever later occurs; three-fifths of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on January first of the third calendar year occurring after the date on which the property was included within the city or after September 28, 1985, whichever later occurs; four-fifths of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on January first of the fourth calendar year occurring after the date on which the property was included within the city or after September 28, 1985, whichever later occurs all of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on and after January first of the fifth calendar year occurring after the date on which the property has included within the city or after September 28, 1985, whichever later occurs.

2. Any property excluded from a fire protection district by reason of subsection 1 of this section shall be subject to the provisions of section 321.330.

If, by virtue of the population of the City of Joplin, Section 321.322 is applicable, the fire protection district is eligible to continue taxing the area added to the City of Joplin pursuant to the formula set forth in such section.

Furthermore, such area would also be subject to Section 321.330, RSMo 1986, which states:

All real property included within, or excluded from, a district shall thereafter be subject to the levy of taxes for the payment of any indebtedness of the district outstanding at the time of inclusion or exclusion; provided, however, that after any real property shall have been excluded from

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a district, as herein provided, any buildings and improvements thereafter erected or constructed on said excluded real property, and all machinery and equipment thereafter installed or placed therein or thereon, and all tangible personal property not in said district at the time of the exclusion of said real property from said district which shall thereafter be situate on or used in connection with said real property, shall not be subject to any taxes levied by said district.

Whether the area added to the City of Joplin is still subject to taxation by the Redings Mill Fire Protection District is dependent upon the population of the City of Joplin. For purposes of determining the relevant population of the City of Joplin, see Section 1.100, RSMo 1986, which provides:

1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961.

2. Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation

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shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed. Once a city not located in a county has come under the operation of such a law a subsequent loss of population shall not remove that city from the operation of that law. No person whose compensation is set by a statutory formula, which is based in part on a population factor, shall have his compensation reduced due solely to an increase in the population factor.

See also Sections 71.160 through 71.180, RSMo 1986, which provide for a special census.

Newton County Ambulance District

Ambulance districts are created and managed pursuant to Sections 190.005 to 190.085, RSMo 1986. Section 190.010.1 provides in part: "An ambulance district may include municipalities or territory not in municipalities or both or territory in one or more counties; . . . . The territory contained within the corporate limits of an existing ambulance district shall not be incorporated in another ambulance district."

It is apparent from this language that the ambulance district may exist within the boundaries of the City of Joplin since the district may include both municipalities and nonmunicipal territory. It is likewise apparent that an existing ambulance district's territory cannot be incorporated in another ambulance district. The applicable statutes governing ambulance districts do not contain any provisions similar to those that exist for fire protection districts restricting taxation by the district in an area added to the city. Therefore, we conclude the Newton County Ambulance District may continue to tax that area within the district added to the City of Joplin.

In summary, it is the opinion of this office that the area in question which was recently added to the City of Joplin will continue to be subject to taxation by the City-County Library District of Neosho-Newton County and the Newton County

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Ambulance District. Whether such area remains subject to taxation by the Redings Mill Fire Protection District and the extent to which it remains subject to such taxation is determined by the relevant population of the City of Joplin.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 207, Proffer, 1972

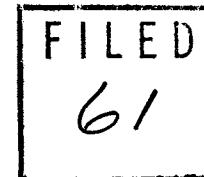
CITIES, TOWNS & VILLAGES:  
CONSTITUTION:  
CONSTITUTIONAL LAW:  
FREEHOLDERS:  
SAINT LOUIS CITY:

1. A board of freeholders organized under Article VI, Section 30(a), Missouri Constitution (as amended 1966) has the power to propose for a vote by the qualified electors of the City of St. Louis and St. Louis County a plan involving the disincorporation of existing municipalities and the incorporation of new municipalities provided the changes affect all or part of both the City of St. Louis and St. Louis County.  
2. The people of the City of St. Louis and St. Louis County do not have the power under Article VI, Section 30(a) to enact a plan which consolidates municipalities in St. Louis County without providing for changes in all or part of the City of St. Louis. 3. The language in Article VI, Section 30(a) which provides "to establish a metropolitan district or districts for the functional administration of services common to the area included therein" does not authorize the board of freeholders to consolidate existing municipalities and incorporate new municipalities.

April 28, 1987

OPINION NO. 61-87

The Honorable Neil Molloy  
Representative, District 81  
House Post Office  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Molloy:

This opinion is in response to your questions asking:

1. Can a board of freeholders organized under Article VI, Section 30(a), [Missouri Constitution (as amended 1966)] disincorporate existing municipalities and incorporate new municipalities?
2. Can the board of freeholders appointed under Article VI, Section 30(a) consolidate municipalities only in St. Louis County in light of language which suggests that reorganization should

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occur both in the City of St. Louis and St. Louis County "to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county?"

3. Does language in Article VI, Section 30(a), "(4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein" authorize the board of freeholders to consolidate existing municipalities and incorporate new municipalities?

By "municipalities" we understand you to denote cities, towns and villages in St. Louis County as opposed to the broader meaning sometimes given to that term, as in St. Louis Housing Authority v. City of St. Louis, 239 S.W.2d 289 (Mo. banc 1951).

Article VI, Section 30(a), Missouri Constitution (as amended 1966) provides, in pertinent part:

The people of the city of St. Louis and the people of the county of St. Louis shall have power (1) to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or, (2) to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or, (3) to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or, (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or, (5) to formulate and adopt any other plan for the partial or complete government of all or any part of the city

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and the county. The powers so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. . . . .

Article VI, Section 30(b), Missouri Constitution (1945), provides, in pertinent part:

The board shall prepare and propose a plan for the execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder. . . . The plan shall be signed in duplicate by the board or a majority thereof, and one copy shall be returned to the officials having general charge of elections in the city, and the other to such officials in the county, within one year after the appointment of the board. Said election officials shall cause separate elections to be held in the city and county, on the day fixed by the freeholders, at which the plan shall be submitted to the qualified voters of the city and county separately. . . . If a majority of the qualified electors of the city voting thereon, and a majority of the qualified electors of the county voting thereon at the separate election shall vote for the plan, then, at such time as shall be prescribed therein, the same shall become the organic law of the territory therein defined, and shall take the place of and supersede all laws, charter provisions and ordinances inconsistent therewith relating to said territory. If the plan be adopted, copies thereof, . . . shall be deposited in the office of the secretary of state and recorded in the office of the recorder of deeds for the city, and in the office of the recorder of deeds of the present county, and the courts of this state shall take judicial notice thereof.

In regard to the first question, the above-quoted sections of the Constitution demonstrate that the board of freeholders

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has no power to disincorporate existing municipalities and incorporate new ones. The only power the board has is to propose a plan providing for such matters and to present it to the city and county election officials in order for the people in the city and county to vote on it. Only the vote of a majority in the city and a majority in the county has the power to make the plan law.

Implicit in the first question, of course, is whether the provisions of Article VI, Section 30(a) allow for a plan which both disincorporates and incorporates municipalities. This issue is also at the heart of questions two and three.

Of the five categories of reorganization plans which Article VI, Section 30(a) gives the city and county the power to adopt, only the fifth type could involve both the disincorporation and incorporation of cities, towns and villages in the county. The fourth type of plan involves only the creation of special purpose districts to provide common services such as the Metropolitan St. Louis Sewer District does. This does not include the power to disincorporate and incorporate cities, towns and villages.

Under the fifth category, the question arises as to whether a plan authorized thereunder must effect reorganization in both the city and the county? Interpretation of Article VI, Section 30(a) and (b) is guided by the following principles:

Rules employed in construction of constitutional provisions are the same as those employed in construction of statutes, but the former are to be given a broader construction due to their more permanent character. . . . Crucial words must be viewed in context and it must be assumed that words used were not intended to be meaningless. . . . This Court has recognized that in construction of constitutional provisions, it should undertake to ascribe to words the meaning which the people understood them to have when they adopted the provision. . . . "The framers of the Constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language." . . . The meaning of the words in the provision, as

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conveyed to the voters, is presumed to be their natural and ordinary meaning. . . . The ordinary, and commonly understood meaning is derived from the dictionary. . . . Moreover, the grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed. . . . Of course, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole. [citations omitted] Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982).

The plain language of the fifth category in Article VI, Section 30(a) supports the interpretation that it empowers a plan which must effect reorganization in all or part of both the county and the city because the language provides that the plan be for the government "of all or any part of the city and the county." [emphasis added]. If the disjunctive would have been intended, "or" would have been used instead of "and". Boone County Court v. State, 631 S.W.2d 321, 325 (Mo. banc 1982).

The key principle here is to determine the primary objectives of the constitutional sections involved, and which construction given the words "all or any part of the city and the county" would be in harmony with those objectives and with the rest of the provisions of those sections. All of the procedures set forth in subsections (a) and (b) of Section 30 require joint participation by both the City of St. Louis and St. Louis County. Immediately following the five categories of powers set forth in subsection (a), the Constitution directs that these powers should be exercised by the vote of the people from both the city and the county. The plan to be presented to the voters is formulated by a board of freeholders consisting in part of nine members each from both the city and the county. The chief executive of each entity appoints the members from his respective jurisdiction with the respective legislative body approving the same. The board of freeholders is not appointed until separate petitions are received signed by the required number of voters from both the city and the county. Section 30(b) also follows this joint scheme providing that the board's expenses are to be shared equally by the city and the county and that the board's final plan of governmental reorganization is to be submitted to election officials of both the city and the county. Those officials cause "separate elections to be held in

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the city and county . . . at which the plan shall be submitted to the qualified voters of the city and county separately." The plan becomes law only if a majority in each of the city and the county vote for the plan at separate elections. If adopted, the plan is certified to by election officials of both the city and the county and recorded in the office of the recorder of deeds for the city and in the office of the recorder of deeds for the county.

The scheme set out in subsections (a) and (b) supports only the conclusion that the language setting forth the fifth category of powers is to be taken at its plain meaning, that is, the plan must involve reorganization to some extent of the city as well as of the county. It is evident that the five categories of powers set forth in Section 30(a) are for the purpose of resolving problems common to both the city and the county by means of providing for plans involving both entities. The fifth category of plan need not affect all of the city or all of the county but must involve in the reorganization at least a part or some aspect of both entities. A plan which involves disincorporating and incorporating municipalities only in the county while making no provisions which change matters in the City of St. Louis would not be authorized by Article VI, Section 30(a).

"In placing a construction on a constitution, or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted, in order to ascertain the old law, the mischief and the remedy." State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S.W.2d 131, 133-134 (Mo. banc 1932).

An examination of the debates of the Constitutional Convention of 1943-1944 which formulated what eventually became Article VI, Section 30(a) (as it existed before 1966) and (b) demonstrates that the primary concern of the framers of the constitution was to accommodate the competing interests of the City of St. Louis and of the County of St. Louis concerning the desire of the city to expand.<sup>3</sup> The "mischief" addressed was that the city wanted to free itself of the stifling effects of its inability to expand beyond its boundaries while the county acted to protect its independence from the city and its problems by insisting on a county-wide vote on any proposed changes.<sup>4</sup> The following quotations of statements made by delegates to the constitutional convention best express their concerns:

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"St. Louis had a serious situation which it wanted to correct. The County of St. Louis was proud of its independence as a county and felt that the various plans suggested [in the Metropolitan Government Committee] were going to take away from them something which they rightfully possessed and it didn't appear that anything could work out of it." Statement by Delegate Hughes, Debates of the Missouri Constitution 1945, Vol. X, p. 2890.

"The people of St. Louis County, gentlemen, are not going to give up the control of their schools to St. Louis if they can avoid it. They're not going to give up the control over these larger cities [those contiguous to the city] to St. Louis." Statement by Delegate Stevens, Id. at p. 2930.

"Now, there was a separate election provided both in my minority report and in the majority report and I agree that that's a sacred provision in both these reports and that is the democratic way to handle this situation." Statement by Delegate Heege, Id. at p. 3057.

The fifth category of powers was added to Section 30(a) at the general election on November 8, 1966. This was after two attempts had been made to achieve some type of metropolitan-wide reorganization. In 1959, the board of freeholders under Section 30(a) and (b) submitted a plan to create a multipurpose metropolitan district. It was defeated. In 1962, a constitutional amendment which would have created a new municipal corporation embracing the limits of the old city and county in a so-called "borough plan" was also defeated.

The text of the 1966 amendment is found at Laws of Missouri 1965, p. 675. The amendment began as House Joint Resolution No. 1 in the Seventy-Third General Assembly. A legislative title of the joint resolution as well as the ballot title both contained the same type of language as in the amendment itself providing that the amendment affect both the city and the county. There is no language or legislative history to support a contrary intent.<sup>6</sup> The 1966 amendment appears, then, to be an attempt to grant a more flexible authority for the freeholders to be able to develop any of a wide range of plans

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to resolve the city-county problems.<sup>7</sup> There is no indication that this amendment was to give authority for the board of freeholders to submit a plan to resolve only county problems by governmental reorganization affecting only the county and its municipalities. If the legislature would have wanted to submit a constitutional amendment to the voters authorizing a plan to affect the county only, it needed only to have changed the "and" to "or" for the fifth category to read ". . . all or any part of the city or the county". It is the term "or" which indicates the disjunctive when used in the constitution and not the word "and". Boone County Court v. State, supra, at 325.

As the constitutional debates demonstrate, the problem, or "mischief", addressed by Article VI, Section 30(a) and (b) was one in which the city was seeking to alleviate its economic problems by enlarging or consolidating at what the county considered to be the county's expense. The idea that the county could use these provisions for the sole purpose of achieving reorganization within its own borders, such as in the consolidation of municipalities, was never mentioned and apparently never contemplated. This is reflected in the required joint participation of the city and the county in the formulation and enactment of any of the categories of plans which Section 30(a) empowers the people to enact. It would make little sense for the constitution to have required the city to participate in the formulation and enactment of a plan which changed only parts of the county while leaving the city untouched. Framers of the constitution provided that votes be taken by both the county and the city because each of the first four powers set forth in subsection (a) required a plan which makes actual changes to both the city and the county in matters of legal characteristics, such as territory, powers, jurisdiction and government structure. Since the amendment in 1966 left intact the original provisions mandating participation by both the city and the county in the formulation and enactment of any plan of reorganization, it is logical to infer that the fifth power provided by the 1966 amendment was of the same nature as the original four powers in that it was to provide for actual changes in both the city and the county.

To interpret the constitution otherwise would allow the spectacle of having the city go through all the involved procedures set forth in Section 30(a) and (b), including a vote by all its qualified voters, when the city and its citizens have no governmental interest in the result of the proceedings. Legislation, and particularly the constitution, should never be interpreted to yield an absurd or unreasonable consequence. Theodoro v. Department of Liquor Control, 527 S.W.2d 350, 353

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(Mo. banc 1975); and Tribune Publishing Company v. Curators of University of Missouri, 661 S.W.2d 575, 583 (Mo.App. 1983).

Therefore, taking into consideration the plain meaning of the words used, the relationship of those words to the entire structure of Section 30(a) and (b), and the "mischief" intended to be addressed by that section and by the 1966 amendment to it, this office can only conclude that none of the five categories of powers set forth in Section 30(a) would allow the board of freeholders to propose a plan the only effect of which is to incorporate and disincorporate cities, towns and villages within the boundaries of St. Louis County.

#### CONCLUSION

Therefore, it is the opinion of this office that:

1. A board of freeholders organized under Article VI, Section 30(a), Missouri Constitution (as amended 1966) has the power to propose for a vote by the qualified electors of the City of St. Louis and St. Louis County a plan involving the disincorporation of existing municipalities and the incorporation of new municipalities provided the changes affect all or part of both the City of St. Louis and St. Louis County.
2. The people of the City of St. Louis and St. Louis County do not have the power under Article VI, Section 30(a) to enact a plan which consolidates municipalities in St. Louis County without providing for changes in all or part of the City of St. Louis.
3. The language in Article VI, Section 30(a) which provides "to establish a metropolitan district or districts for the functional administration of services common to the area included therein" does not authorize the board of freeholders to consolidate existing municipalities and incorporate new municipalities.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

The Honorable Neil Molloy

NOTES

<sup>1</sup>The explanations of this fourth category of power provided at the constitutional convention of 1943-1944 support this interpretation.

"The idea of functional cooperations between the city and county and in view of the direction which this Convention seemed headed, it seemed appropriate that we should put into this plan some scheme whereby there might be functional cooperations between the city and the county. That is this fourth provision." Statement by Delegate Hughes, Debates of the Missouri Constitution 1945, Vol. X, p. 2891.

"Now, that's the thing Mayor Kaufmann started out to get, when he was talking last fall he wanted to consolidate functional services by metropolitan districts. What does that mean? It means that we can have sewer districts comprising the whole of St. Louis and all of St. Louis County, that [the delegate went on to use such examples as metropolitan-wide fire districts, water districts and airport districts.]" Statement by Delegate Stevens, Id. at pp. 2938-2939.

However at least one delegate expressed some problem about the term "functional administration of services" being too ambiguous and susceptible of too broad of an interpretation. Id. at p. 3061.

The proceedings and debates of the constitutional convention can be consulted to assist in the interpretation of the constitution even though they are not of binding force and their value depends upon the circumstances. Stemmler v. Einstein, 297 S.W.2d 467, 475 (Mo. banc 1956).

<sup>2</sup>The board is completed by the governor appointing a nineteenth freeholder who must be a resident of the state but not of the city or the county. Article VI, Section 30(b), Missouri Constitution. The purpose of this freeholder was to provide an objective and fair vote to break any deadlocks between the city and the county. Debates of the Missouri Constitution 1945, Vol. X, p. 2891; Faust, M.L., Constitution

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Making in Missouri: The Convention of 1943-1944, National Municipal League, N.Y., N.Y., 1971, p. 123.

<sup>3</sup> The debates on Article VI, Section 30(a) and (b) are found in Debates of the Missouri Constitution 1945, Vol. X, pp. 2887-2904, 2907-2975, 2980-3033, 3035-3108.

<sup>4</sup> Under a constitutional amendment adopted in 1924, which closely resembled Article VI, Section 30(a) and (b), a city-county consolidation plan was proposed in 1926. It won overwhelmingly in the city but lost decisively in the county. In 1930, a constitutional amendment to consolidate the city and county as a federated city won narrowly in the city and lost in the county. It was rejected in the statewide vote. Faust, supra, at p. 115.

<sup>5</sup> The title of the joint resolution provided:

Joint resolution submitting to the qualified voters of the state of Missouri an amendment repealing section 30(a) of Article VI of the Constitution of the State of Missouri, relating to the City and County of St. Louis, and adopting one new section in lieu thereof relating to the same subject.  
[emphasis added]

The ballot title provided:

House Joint Resolution No. 1 -- Broadens the authority of the people of St. Louis city and St. Louis county to formulate and adopt a plan for the partial or complete government of all or any part of the city and the county of St. Louis; and provides that the city's members of the board of freeholders shall be appointed by the mayor with the approval of a majority of the board of aldermen and that the county's members of the board of freeholders shall be appointed by the county supervisor with the approval of a majority of the county council.  
[emphasis added] Laws of Missouri, 1965, p. 675.

<sup>6</sup> An examination of the House and Senate Journals of the Seventy-Third General Assembly indicates that House Joint Resolution No. 1 was not amended during its passage through those chambers. The Senate defeated a motion to amend it on the

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floor by deleting the words "and thereafter the city may extend its limits in the manner provided by law for other cities." Senate Journal, Seventy-Third General Assembly, p. 811. An attempt to amend the joint resolution on the floor of the House was also defeated. House Journal, Seventy-Third General Assembly, p. 373. The text of that amendment is not set out in the Journal nor has it been retained in the state archives.

<sup>7</sup> Newspaper articles around the time of the election on the 1966 amendment, or the "Fifth Avenue Amendment" as it came to be called, all indicate that this amendment must provide flexibility for both the city and the county to resolve their common problems.

"The constitutional amendment, giving the city and county wide latitude in co-operative efforts, needs a simple majority for approval." [emphasis added]  
Kansas City Star, October 16, 1966

"It [the amendment] gives much broader latitude to a board of freeholders to combine some or all governmental services of the city and county, with the approval of the voters." "Jack Flack Reports", [emphasis added] St. Louis Globe-Democrat, October 19, 1966.

"The so-called 'fifth avenue' amendment to the Constitution, to give St. Louis city and county an additional way of solving some of their mutual governmental problems, won by a 3,749-vote margin, . . ."

\* \* \*

"But the final affirmative vote puts it in the Constitution and provides one more way for the city and county to co-operate in governmental problems that affect them both." [emphasis added] St. Louis Post Dispatch, December 4, 1966.

"Fifth avenue gives the people of city and county the right to frame and adopt any plan they find acceptable for the solution of common governmental problems. Until now the Constitution had limited attempts at solutions to four specific devices. . . .

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"Experience growing out of the metropolitan freeholder deliberations of 1958-59 demonstrate these grants were far too restrictive. Shortly thereafter former Mayor Tucker began the campaign for a fifth option, which has now been narrowly approved in a state-wide vote in which St. Louis county's view was slightly on the negative side.

"The question is what if anything city and county should do with their new authority. . . . What are the areas of mutual concern in which use of the fifth option would be necessary, desirable and probably acceptable by the concurrent majorities required by the Constitution?

"In the long history of efforts to institutionalize city-county co-operation under this section of the Constitution, only one scheme has proved acceptable to both city and county voters, the plan for the Metropolitan Sewer District. . . .

"Getting city and county to co-operate is going to be difficult enough in any case. Recent history has demonstrated the clear need for study and agreement by both a citizens group and the area's elected political leadership before freeholders are called into action." [emphasis added]  
Editorial, St. Louis Post Dispatch, December 7, 1966.



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

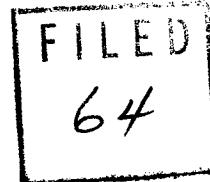
JEFFERSON CITY  
65102

P. O. Box 800  
(314) 751-3321

March 10, 1987

OPINION LETTER NO. 64-87

Carl M. Koupal, Jr.  
Director  
Department of Economic Development  
Post Office Box 1157  
Jefferson City, Missouri 65102



Dear Mr. Koupal:

This opinion is in response to your questions asking:

1. Does the use of money appropriated by the General Assembly to the Missouri Industrial Development Board's Industrial Development and Reserve Fund (the "Fund"), to make and guarantee loans to private individuals pursuant to Sections 100.281 and .286, RSMo 1986, violate the lending of credit provisions of Mo. Const. Article III, Sections 38(a) and 39?
2. Does the use of money appropriated by the General Assembly to the Fund to make and guarantee loans to private individuals pursuant to Sections 100.281 and .286, RSMo 1986, violate the grant of public money provision of Mo. Const. Article III, Section 38(a)?

Article III, Section 38(a) of the Missouri Constitution provides:

Section 38(a). Limitation on use of state funds and credit -- exceptions -- public calamity -- blind pensions -- old age assistance -- aid to children -- direct relief -- adjusted compensation for veterans -- rehabilitation -- participation in

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federal aid. The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.

Article III, Section 39(1) and (2) of the Missouri Constitution provides:

Section 39. Limitation of power of general assembly. The general assembly shall not have power:

(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;

A copy of Section 100.281, RSMo 1986, is attached hereto as Appendix I and a copy of Section 100.286, RSMo 1986, is attached hereto as Appendix II.

We understand that the recent decision of the Missouri Supreme Court in Curchin v. Missouri Industrial Development Board, No. 68784, Missouri Supreme Court en banc, January 8, 1987, gives rise to your question. In that case, the Missouri Supreme Court held the tax credits under Section 100.297, RSMo 1986, to be unconstitutional in violation of Article III, Section 38(a) of the Missouri Constitution.

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Under Section 100.297, the Missouri Industrial Development Board was authorized to include in its industrial revenue bonds a provision allowing a state tax credit for the amount of any unpaid principal and accrued interest in default. The tax credit was available to the original bondholder and all subsequent bondholders. In holding the tax credit provision unconstitutional, the court stated:

This tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected. The tax credit authorized in § 100.297 simply shifts the risk of loss upon default from the bondholder to the state. The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution.

There is also a lending of public credit, in violation of Article III, Section 38(a). The state's tax resources are effectively pledged as the ultimate security for the bonds. Curchin v. Missouri Industrial Development Board, No. 68784, Missouri Supreme Court en banc, January 8, 1987, slip opinion at page 7.

In rejecting an argument that the tax credits were designed to promote the public purpose of general economic welfare, the court stated:

Missouri has demonstrated its encouragement of the growth and revitalization of its industries by upholding the constitutionality of industrial revenue bonds not incorporating the tax credit. Menorah Medical Center v. Health and Educ. Facilities Auth., 584 S.W.2d 73 (Mo. banc 1979); State ex rel. Jardon v. Industrial Dev. Auth. of Jasper County, 570 S.W.2d 666 (Mo. banc 1978); State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis,

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517 S.W.2d 36 (Mo. banc 1975). Some states have held the issuance of industrial revenue bonds to be unconstitutional. No state has upheld the constitutionality of industrial revenue bonds which provide for state tax credits upon default.

Section 100.297 allows the Board to choose the companies which it will support with the tax credit. Providing the tax credits to only a select few companies lends itself to abuse and is analogous to the railroad grants of yesteryear, which prompted the adoption of Article III, Section 38(a) of the Missouri Constitution.

While it is possible that the projects to be supported by the tax credit-bearing revenue bonds could have a beneficial impact on the economy of the state, the grant of public money to these businesses' bond-holders is unconstitutional just as railroad grants were. Curchin v. Missouri Industrial Development Board, No. 68784, Missouri Supreme Court en banc, January 8, 1987, slip opinion at page 10.

As pointed out by the court, Missouri has encouraged the growth and revitalization of its industries by upholding the constitutionality of industrial revenue bonds not incorporating the tax credit. Industrial development has long been considered a legitimate public purpose. See State ex rel. Wagner v. St. Louis County Port Authority, 604 S.W.2d 592 (Mo. 1980); State ex rel. Jardon v. Industrial Development Authority of Jasper County, 570 S.W.2d 666 (Mo. 1978); State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36 (Mo. 1975). We do not view Curchin as changing this conclusion. Curchin specifically held the tax credits under Section 100.297 to be unconstitutional. We do not interpret the decision as going beyond that holding.

Based upon our interpretation of the decision of the Missouri Supreme Court in Curchin, in our opinion, Sections 100.281 and 100.286, RSMo 1986, do not violate Article III, Sections 38(a) or 39 of the Missouri Constitution. A statute has a presumption of constitutionality. Westin Crown Plaza Hotel Company v. King, 664 S.W.2d 2 (Mo. banc 1984). A

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statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision. C.L.P. v. Pate, 673 S.W.2d 18 (Mo. banc 1984); State v. Hampton, 653 S.W.2d 191 (Mo. banc 1983).

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

## Appendix I

**100.281. Project plan, approval procedure—board to review and grant loan, when—copies of documents to be filed with department of economic development.**—1. A request for a loan from the development and reserve fund to carry out a project shall be in the form of an application for the project to the board, which application shall be in such form as the board may specify. After reviewing the application and such other information as the board may require, the board may grant all or a part of the loan request, provided the board determines that:

- (1) The project will be a benefit to the economy or infrastructure of the state; and
  - (2) The project will generate sufficient revenues to enable the borrower to repay the loan to the development and reserve fund along with any interest to be charged; and
  - (3) In the case of an infrastructure facility project, the loan will not exceed one million dollars.
2. When the board makes a loan under the provisions of sections 100.250 to 100.297, copies of all documents filed in support of the loan application and copies of all agreements, notes, evidence of debts, or security agreements connected with such loan may be forwarded to the department of economic development, and if so forwarded, that department shall thereafter be

responsible for the administration of such agreements; but the board shall not transfer or assign any of its interests under any of such agreements to the department of economic development. In the event of a substantial default in the terms of any such agreements, the department of economic development shall notify the board in order that the board may take whatever steps it deems necessary to protect its interests.

3. Notwithstanding any other provision of law to the contrary, all development agencies, as defined in section 100.255, shall have the power to borrow funds from the board for any project to contract with the board, and to furnish a security interest in any of their revenues or properties to the board to secure a loan from the board and to issue notes in evidence thereof upon such terms as such development agencies shall determine.

4. When the board issues bonds to provide loans for more than one infrastructure project, the board shall make a reasonable effort to sell the bonds to a purchaser that represents a group consisting of more than one underwriter.

(L. 1985 H.B. 416, A.L. 1986 S.B. 664 and S.B. 731 and H.B. 989 & 1390)

## Appendix II

**100.286. Loans secured by development and reserve fund—standards—information required—review and certification by participating lender—board approval—fee—tax credit.**—1. Within the discretion of the board, the development and reserve fund may be pledged to secure the payment of any bonds or notes issued by the board, or to secure the payment of any loan made by the board which loan:

- (1) Is requested to finance any project;
- (2) Is requested by a borrower who is demonstrated to be financially responsible;
- (3) Can reasonably be expected to provide a benefit to the economy of this state;
- (4) Is otherwise secured by a mortgage or deed of trust on real or personal property or other security satisfactory to the board; provided that loans to finance export trade activities may be secured by export accounts receivable or inventories of exportable goods satisfactory to the board;
- (5) Does not exceed five million dollars;
- (6) Does not have a term longer than five years if such loan is made to finance export trade activities; and
- (7) Is, when used to finance export trade activities, made to small or medium size businesses, as may be defined by the board.

2. The board shall prescribe standards for the evaluation of the financial condition, business history, and qualifications of each borrower

and the terms and conditions of loans which may be secured, and may require each application to include a financial report and evaluation by an independent certified public accounting firm, in addition to such examination and evaluation as may be conducted by any participating lender.

3. Each application for a loan secured by the development and reserve fund shall be reviewed in the first instance by any participating lender to whom the application was submitted. If satisfied that the standards prescribed by the board are met and that the loan is otherwise eligible to be secured by the development and reserve fund, the participating lender shall certify the same and forward the application for final approval to the board.

4. The securing of any loans by the development and reserve fund shall be conditioned upon approval of the application by the board, and receipt of an annual reserve participation fee, as prescribed by the board, submitted by or on behalf of the borrower.

5. The securing of any loan by the development and reserve fund for export trade activities shall be conditioned upon the board's compliance with any applicable treaties and international agreements, such as the general agreement on tariffs and trade and the subsidies code, to which the United States is then a party.

6. Any taxpayer shall be entitled to a tax credit against any tax otherwise due under the provisions of chapter 143, RSMo, in the amount of fifty percent of any amount contributed by the taxpayer to the development and reserve fund during the taxpayer's fiscal year. Such credit shall not apply to reserve participation fees paid by borrowers under sections 100.250 to 100.297.

(L. 1985 H.B. 416, A.L. 1986 S.B. 731)

COUNTIES:  
COUNTY EXTENSION:  
COUNTY TAXES:  
ELECTIONS:  
PROPERTY TAX:

The Monroe County Commission is without authority to submit at referendum the proposition of levying and collecting a special tax for the benefit of the county agricultural extension program.

June 4, 1987

OPINION NO. 65-87

Mr. Craig V. Evans  
Monroe County Prosecuting Attorney  
Post Office Box 253  
Paris, Missouri 65275

FILED  
65

Dear Mr. Evans:

This opinion is in response to your question asking:

May the County of Monroe increase the general tax levy on taxable real and personal property in the county, by five cents on the hundred dollars assessed valuation, for the limited purpose, expressed on the ballot, of funding of the Monroe County Extension Division Office, by placing such levy increase on the election ballot for approval by the people?

The law relating to county extension programs includes these provisions:

Section 262.553. University may receive and disburse federal grants for extension work. -- The assent of the general assembly having heretofore been given to the provisions and requirements of the Act of Congress of May 8, 1914, . . . , the University of Missouri is authorized and empowered to receive and expend the grants of money appropriated under said acts . . . together with any money appropriated by the state or received from any source whatsoever for the aid of extension work in the counties of Missouri and to cooperate with the United States Department of Agriculture, other agencies, and with persons and organizations in the conduct thereof, . . .

Mr. Craig V. Evans

Section 262.557. Formulation and administration of extension program. -- The university may formulate an extension program in the counties of the state and shall be responsible for the administration and execution of the extension program in each county.

Section 262.560. University to hire employees -- salaries and expenses paid, how. -- The university shall have the responsibility and authority to employ such persons as it deems necessary and proper for the conduct of extension work . . . provided that, in counties having a council, the council shall pay such salaries and expenses as shall be assigned to it in the financial budget.

Section 262.563. Missouri extension council established in county, when. --  
1. The university may establish a University of Missouri extension council in each of the counties of the state, . . .

\* \* \*

Section 262.597. Financial budget for extension programs -- appropriations from counties. -- The council, in cooperation with the county commission and the university, shall prepare an annual financial budget covering the county's share of the cost of carrying on the extension services . . . which shall be filed with the county commission on or before January first each year and the county commission shall include the budget so filed in class four of the budget of county expenditures for such year in counties budgeting county expenditures by classes, and in the budget document of all other counties, subject to the following minimum appropriations:

\* \* \*

(2) In counties with an assessed valuation of twenty-five million dollars or

Mr. Craig V. Evans

more, but less than seventy million dollars,  
five thousand dollars;

\* \* \*

Section 262.600. Monthly requisitions on county commission, how issued, amount of -- reversion of funds. -- Immediately following the close of each month the council shall requisition the county commission for the estimated amount of the month's expenditures . . . The requisition shall constitute the basis for immediate issuance by the county commission and it shall, if there be funds available therefor, promptly issue a warrant covering the requisition in full and drawn in favor of the treasurer of the council. . . . The requisition for any given month shall not exceed one-twelfth of the total amount appropriated for the year unless a reserve shall have accumulated as a result of expending less than the aforementioned twelfth portion during one or more preceding months, . . . Any unused funds remaining in the appropriation on December thirty-first shall revert to the county treasury.

This law was enacted by House Bill No. 153 of 1961 ("AN ACT relating to the University of Missouri Agricultural Extension Division. . . ." Laws of Missouri 1961, pp. 7-15). Concomitantly, a special and supplemental financing mechanism for certain county extension programs was enacted, House Bill No. 261 of 1961 ("AN ACT to authorize a millage tax for university extension." Laws of Missouri 1961, pp. 15-17). This latter enactment provided:

Section 1. Voters may authorize tax for university extension program (class three and four counties). -- Whenever qualified voters equal to five percent . . . in any third and fourth class county shall petition . . . the county court asking that an annual tax be levied for the purpose of financing the county's share of the university extension program, and . . . that the tax rate shall be determined annually by a committee . . . and shall not exceed two mills on the dollar of assessed valuation;

Mr. Craig V. Evans

then the county court . . . shall order that the propositions of such petition be submitted to the voters of the county . . . .

Section 2. Election -- reconsideration -- 1. . . . The order of court and the [election] notice shall specify . . . the rate of taxation mentioned in the petition, . . . .

2. If . . . the majority of all the votes . . . shall be "For levying a tax, not to exceed two mills, for financing the county's share of carrying out the university extension program", . . . an annual tax shall be levied by the county court, the amount agreed upon by a committee. . . . Whenever revenue from the tax levied . . . is available, it shall all be expended for university of Missouri extension work, and if these funds equal or exceed the minimum amount required to be contributed by a county, that county shall not be required to contribute any funds from its general revenue . . . .

\* \* \*

4. The tax may be reconsidered. . . . At least two years must elapse after the tax has been levied . . . before an election may be held on a proposition to reconsider the tax.

Section 5. Effective, when -- This act shall become effective upon the adoption by the eligible voters of the State of Missouri of a Constitutional amendment authorizing the tax provided for in this act.

The constitutional amendment alluded to in Section 5 of House Bill No. 261 of 1961 was included in House Joint Resolution No. 9 of 1961 (Laws of Missouri 1961, p. 666) which was rejected by the voters of the state at the August 7, 1962 election (Laws of Missouri 1963, p. 691). To the best of our knowledge, no further proposal to amend the constitution was ever submitted to the voters and so House Bill No. 261 of 1961 never became effective.

Mr. Craig V. Evans

The taxation article of the Missouri Constitution, Article X, includes these provisions:

Section 1. Taxing power -- exercise by state and local governments. The taxing power may be exercised . . . by counties . . . under power granted to them by the general assembly for county . . . purposes.

\* \* \*

Section 11(b). Limitations on local tax rates. Any tax imposed . . . by . . . counties . . . for their . . . purposes, shall not exceed . . . fifty cents on the hundred dollars assessed valuation. . . .

Section 11(c). Increase of tax rate by popular vote -- further limitation by law -- exceptions to limitations. In all . . . counties . . . the rate of taxation as herein limited may be increased for their . . . purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; . . . and provided, that the rates herein fixed, and the amounts by which they may be increased may be further limited by law; and provided further, that any county . . . when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes.

\* \* \*

In State ex rel. American Central Ins. Co. v. Gehner, 280 S.W. 416 (Mo. banc 1926), the full Missouri Supreme Court made these observations:

A tax upon whatever character of property it is sought to be levied is a pecuniary burden imposed by legislative authority upon the property of a citizen for the support of the government. The

Mr. Craig V. Evans

Legislature, subject to the constitutional limitation upon state power in this respect, alone has the authority to determine the time, amount, nature, and purpose of the taxes to be levied. The power of taxation, while a sovereign right of the state, may be exercised with respect to all persons, things, and business activities which exist under the protection of its laws, provided clear and express statutes have been enacted for that purpose. . . . Such statutes operate in invitum and they should be strictly construed -- this upon the presumption that the Legislature, in the comprehensive exercise of this exclusive authority and the searching nature of its extent as to the power of taxation, has not only freed the statute from any doubt or ambiguity, but has so framed it that everything necessary to the assessment, levy, and collection of the taxes on the property upon which the burden is sought to be imposed may be clearly indicated. . . . 280 S.W. at 417 (Judges Walker (writer), Blair, Ragland, Graves, Atwood, Otto, and White) (HELD Insurance companies subject only to taxation statute pertaining to them and not subject to taxation statute pertaining to all business corporations.)

We accordingly are of the opinion that a statute must authorize a county commission to levy and collect a special tax for the benefit of the county agricultural extension program. We find no such statute, particularly in Chapter 137, RSMo 1986, where it is provided:

Section 137.035. What taxes to be assessed, levied, and collected in counties.  
-- The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the constitution and laws of this state, viz: The state tax and taxes necessary to pay the funded or bonded debt of the . . . county, . . . the taxes for current expenditures for counties . . . including taxes which may be levied for

Mr. Craig V. Evans

library, hospitals, public health, recreation grounds and museum purposes, as authorized by law.

Section 137.040. Procedure for assessing, levying, and collecting additional taxes -- limitations -- conditions. --  
1. No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney . . . , upon the request of the county commission . . . shall present a petition to the circuit court of his county, . . . and such circuit court, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order . . . commanding . . . such other tax or taxes . . . .

\* \* \*

The full Missouri Supreme Court, in State ex rel. Philpott v. St. Louis-San Francisco Ry. Co., 247 S.W. 182 (Mo. banc 1922), remarked:

The foregoing provisions [Sections 137.035; 137.040; 137.045; 137.055; 137.065], except the amendment of 1921, were originally enacted in 1879. . . . Ever since their enactment, the levy authorized by section [137.040] . . . has been regarded as a special tax for county indebtedness in addition to the general levy for county purposes. . . .

. . . The only tax that a county court may levy on its own initiative is that for the payment of county current expenditures, as authorized by section [137.035] . . . No other tax for any purpose shall be assessed, levied, or collected, except as authorized by section [137.040] . . . 247 S.W. at 184 (Judges Higbee (writer), Woodson, J. Blair, Elder, Walker, Graves and D. Blair) (HELD Tax ordered by circuit court under Section

Mr. Craig V. Evans

137.040 not subject to statute limiting tax increase in successive tax years.).

The legislature has expressly authorized special taxes (upon local referendum) for particular county programs, e.g.:

Section 262.500 (House Bill No. 69 of 1943; "AN ACT . . . relating to special elections to vote a special levy for the support of district or county fairs held in the county voting such levy. . . ." Laws of Missouri 1943, pp. 317-318).

Section 205.010 (House Bill No. 280 of 1945; "AN ACT to enable . . . counties to build, maintain, manage, and operate public county health centers; . . . authorizing for the levy of taxes for support and operation; . . ." Laws of Missouri 1945, pp. 969-972).

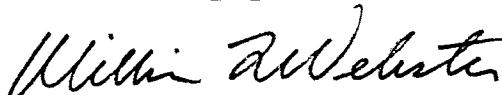
Section 182.010 (House Bill No. 383 of 1921; "AN ACT to provide for establishing county library districts and to establish and maintain free county libraries, including branch libraries for the inhabitants of such district; to empower such districts . . . to levy taxes creating a county library fund and a library building fund; . . ." Laws of Missouri 1921, pp. 461-467).

In the absence of a statute authorizing a special tax for support of the county agricultural extension program, we do not believe counties can impose such a tax.

#### CONCLUSION

It is the opinion of this office that the Monroe County Commission is without authority to submit at referendum the proposition of levying and collecting a special tax for the benefit of the county agricultural extension program.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

Mr. Craig V. Evans

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<sup>1</sup>The 1961 law superseded a 1955 law (House Bill No. 45 of 1955; "AN ACT . . . relating to county agricultural extension programs. . . ." Laws of Missouri 1955, pp. 19-26), which in turn superseded a 1943 law (House Bill No. 112 of 1943; "AN ACT . . . relating to County Farm Bureaus and Organizations. . . ." Laws of Missouri 1943, pp. 319-323), which in turn replaced a 1919 law (House Bill No. 719 of 1919; "AN ACT to provide for the betterment of agriculture and rural conditions, and to authorize county courts to appropriate funds for a county farm bureau to act in co-operation with the university of Missouri college of agriculture and the United States department of agriculture in aiding and encouraging the agricultural development of the county. . . ." Laws of Missouri 1919, pp. 112-114), which had replaced a 1913 enactment (House Bill No. 701 of 1913; "AN ACT authorizing county courts to appropriate funds for a county farm adviser to act in co-operation with the state college of agriculture in aiding and encouraging the agricultural development of the county." Laws of Missouri 1913, p. 193).

In upholding the constitutionality of the 1919 law, a division of the Missouri Supreme Court, in Jasper County Farm Bureau v. Jasper County, 286 S.W. 381 (Mo. 1926), observed:

. . . [W]e have no doubt that public funds may be set apart to develop and promote the general agricultural interests of the state by the creation of farm bureaus, for it is a matter of common knowledge that in the agricultural interests of the state lie its chief source of wealth, and that the prosperity of the state springing from this source contributes to the growth and importance of every other industry in the state, as well as to the comfort and happiness of the whole people; and it is in recognition of this indispensable and thoroughly known fact that appropriations made to foster, encourage, and stimulate the agricultural interest of the state have always been regarded as made for a public purpose. 286 S.W. at 383-384  
(Judges Otto (writer), Atwood and Ragland).

The state, by the creation of farm bureaus, has undertaken nothing new. Our Legislatures have recognized similar societies as being of a purely public nature

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for almost 50 years by authorizing appropriations of public funds in support of county agricultural societies. . . .

\* \* \*

Nor are the appropriations provided for under the Farm Bureau Act gifts or grants of public money to private associations or societies, but are rather appropriations in payment for expenditures in carrying out the work of a public county institution. It is true the institution is in the form of a society or association, but the society or association is a public county institution, for the Farm Bureau Act makes it such by providing that the association or society make monthly and annual reports to the county court. . . .

\* \* \*

The Missouri Farm Bureau Act was passed by the Legislature in acceptance of the federal aid tendered by . . . the Smith-Lever Act [May 8, 1914] . . . 286 S.W. at 384.

<sup>2</sup>House Joint Resolution No. 9 of 1961 proposed the addition of the following clause to the end of Section 11(c):

; and in counties of the third and fourth classes, university extension division.

CITIES, TOWNS AND VILLAGES: Section 71.012 and Section  
CITY ANNEXATION: 71.014, RSMo 1986, provide  
FOURTH CLASS CITIES: alternative methods of annexation. A city of the fourth  
class in St. Charles County has the option of proceeding under  
either of these sections.

November 10, 1987

OPINION NO. 66-87

The Honorable Fred Dyer  
Senator, District 2  
State Capitol Building, Room 431  
Jefferson City, Missouri 65101

FILED  
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Dear Senator Dyer:

This opinion is in response to your question asking:

In St. Charles County, must the fourth class cities comply with both Section 71.012 and Section 71.014, RSMo, or is it optional for a city to choose either of these sections and exclude the other and still be in compliance with the laws?

Section 71.012, RSMo 1986, provides:

1. Notwithstanding the provisions of sections 71.015 and 71.860 to 71.920, the governing body of any city, town, or village may annex unincorporated areas which are contiguous and compact to the existing corporate limits of the city, town, or village as provided in this section.

2. (1) When a verified petition, requesting annexation and signed by the owners of all fee interests of record in all tracts of real property located within the area proposed to be annexed, is presented to the governing body of the city, town, or village, the governing body shall hold a public hearing concerning the matter not less than fourteen nor more than sixty days after the petition is received, and the hearing shall be held not less than seven days after notice of the hearing is

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published in newspapers of general circulation qualified to publish legal matters.

(2) At the public hearing any interested person, corporation or political subdivision may present evidence regarding the proposed annexation. If, after holding the hearing, the governing body of the city, town, or village determines that the annexation is reasonable and necessary to the proper development of the city, town, or village, and the city, town, or village has the ability to furnish normal municipal services to the area to be annexed within a reasonable time, it may, subject to the provisions of subdivision (3) of this subsection, annex the territory by ordinance without further action.

(3) If a written objection to the proposed annexation is filed with the governing body of the city, town, or village not later than fourteen days after the public hearing by at least two percent of the qualified voters of the city, town, or village or at least eight qualified voters of the city, town, or village, whichever is the lesser of the two figures, or two qualified voters of the area sought to be annexed if the same contains two qualified voters, the provisions of sections 71.015 and 71.860 to 71.920, shall be followed.

3. If no objection is filed, the city, town, or village shall extend its limits by ordinance to include such territory, specifying with accuracy the new boundary lines to which the city's, town's, or village's limits are extended. Upon duly enacting such annexation ordinance, the city, town, or village shall cause three certified copies of the same to be filed with the clerk of the county wherein the city, town, or village is located, whereupon the annexation shall be complete and final and thereafter all courts of this state shall take judicial notice of the

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limits of that city, town, or village as so extended.

Section 71.014, RSMo 1986, as it applies to fourth class cities, provides in part:

1. Notwithstanding the provisions of section 71.015, the governing body of any city, town, or village which is located within a county which borders a first class county with a charter form of government with a population in excess of nine hundred thousand, proceeding as otherwise authorized by law or charter, may annex unincorporated areas which are contiguous and compact to the existing corporate limits upon verified petition requesting such annexation signed by the owners of all fee interests of record in all tracts located within the area to be annexed.

Both of these sections address an annexation in which a petition is filed by all of the owners of the fee interest in an unincorporated tract of land contiguous and compact to the existing limits of the city. Such voluntary annexation first became possible with the adoption of Section 71.014 in 1973. At that time this procedure was only available to cities located in the counties of St. Charles, Jefferson, and Franklin, counties which bordered St. Louis County, a first class charter county with a population in excess of 900,000. This section avoided the requirements of Section 71.015, whereby a declaratory judgment against the inhabitants in the area to be annexed was required.

In 1976 the legislature adopted Section 71.012. As originally written, Section 71.012.1 contained the following language "except any city located within a county which borders a first class county with a charter form of government with a population in excess of nine hundred thousand . . ." It is apparent that this section was adopted to provide a procedure for voluntary annexation to cities throughout the rest of the state similar to the procedure available to cities in the counties of St. Charles, Jefferson, and Franklin.

In 1980 the legislature amended Section 71.012 deleting the language "excepting cities [in the counties of St. Charles, Jefferson, and Franklin]." Thus the legislature evidenced an intent to allow cities in these counties to proceed under

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Section 71.012. Section 71.014 was left untouched by the legislature in 1980. Also in 1980 the legislature, reacting to allegations that the due process rights of those whose property was being annexed by cities were given no voice in the annexation process, amended Section 71.015 to include such a requirement for involuntary annexations. See State ex inf. Nesslage v. City of Lake St. Louis, 718 S.W.2d 214 (Mo.App. 1986). It is our conclusion, based on the different procedures set forth by statute and the deletion of the language excepting the cities in the counties of St. Charles, Jefferson and Franklin in Section 71.012, that the legislature intended the three procedures to be alternatives available to cities in St. Charles, Jefferson and Franklin Counties.

Our opinion is strengthened by the court's decision in State ex inf. Nesslage v. City of Lake St. Louis, supra. In that case the Missouri Court of Appeals, Eastern District, considered whether Section 71.012 was available to villages and towns, specifically the town of Dardenne Prairie. In holding that the section was available to Dardenne Prairie, the court addressed whether Section 71.012 conflicted with Section 80.030 which requires towns and villages to annex adjacent territory by filing a petition with the county commission. The court determined no conflict existed between Section 71.012 and Section 80.030 "[r]ather, they provide alternative procedures for annexation by a town or village." Id. at 219.

#### CONCLUSION

It is the opinion of this office that Section 71.012 and Section 71.014, RSMo 1986, provide alternative methods of annexation. A city of the fourth class in St. Charles County has the option of proceeding under either of these sections.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

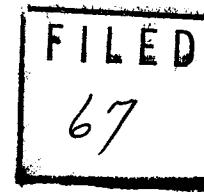
COLLEGES:  
SUNSHINE LAW:  
STATE COLLEGES:

While the Student Government Association of Southwest Missouri State University is not normally a "public governmental body" as defined in Section 610.010(2), RSMo 1986, the provisions of Sections 610.010 to 610.030, RSMo 1986, applicable to "public governmental bodies" may become applicable to the Student Government Association when it participates by way of delegation from the Board of Regents in decisional authority beyond the perimeters of policies, rules and regulations previously formulated and promulgated by the Board of Regents or when the Student Government Association exercises de facto authority tacitly approved or summarily accepted by the Board of Regents.

July 31, 1987

OPINION NO. 67-87

The Honorable Doug Harpool  
Representative, District 134  
State Capitol Building, Room 317-A  
Jefferson City, Missouri 65101



Dear Representative Harpool:

This opinion is in response to your question asking:

Is the Student Government Association of Southwest Missouri State University a "public governmental body" as defined in Section 610.010(2), RSMo 1986?

In order for the provisions of Sections 610.010 through 610.030, RSMo 1986 (the "Sunshine Law") to be applicable to a particular entity, that entity must be one of the four types described in Section 610.010(2) as a "public governmental body". As the court in MacLachlan v. McNary, 684 S.W.2d 534, 536 (Mo.App. 1984) set forth:

Public governmental body is defined as:

1. Any legislative or administrative governmental entity created by the constitution or statute of this state, by order or ordinance of any political subdivision or district, or by executive order including any body, agency, board, bureau, counsel, commission, committee, department, or

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division of the state, of any county or of any municipal government, school district or special purpose district;

2. Any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power;
3. Any committee appointed by or under the direction or authority of any of the above-named entities and which is authorized to report to any of the above-named entities; and
4. Any quasi-public governmental body.

Id. at 536.

In construing this section, the court in Tribune Publishing Company v. Curators of University of Missouri, 661 S.W.2d 575, 584 (Mo.App. 1983) stated:

By its very nature, the quintessence of a "public governmental body" is the power to govern by the formulation of policies and the promulgation of statutes, ordinances, rules and regulations, or the exercise of quasi-judicial power.

Many different canons of legislative construction are cited by Missouri courts when construing the Sunshine Law. See, for example, Tribune Publishing Company v. Curators of University of Missouri, supra, at 583, Remington v. City of Boonville, 701 S.W.2d 804, 806 (Mo.App. 1985); and, MacLachlan v. McNary, supra, at 537. Basically, the courts all agree that the law must be read to mean what the legislature intended from the plain meaning of the words used. The Sunshine Law is "to be construed liberally in favor of open government," MacLachlan v. McNary, supra, at 537, but in a way that a proper balance is struck between the competing interests of the public and government so that there is no "unreasonable, oppressive or absurd result." Tribune Publishing Company v. Curators of University of Missouri, supra, at 583.

The threshold question is whether the Student Government Association (hereinafter "SGA") is an "entity" separate and apart from the Board of Regents and the University. If so it must be determined whether it falls within one of the four

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categories of "public governmental bodies" in Section 610.010(2).

This office has discovered no cases in Missouri or other jurisdictions which discuss whether student government associations are public governmental entities.<sup>2</sup> However, courts have reached conclusions about the relationship of colleges and universities with their respective student government associations in circumstances similar to those at Southwest Missouri State University. In Arizona Board of Regents v. Zappia, 577 P.2d 735 (Ariz. App. 1978), the student government association at the University of Arizona (Associated Students of the University of Arizona, or ASUA) successfully sued the university over the amount of fees charged to certain part-time students. The court affirmed that judgment on appeal and noted that the court had, in a companion case, held that an unincorporated association, such as ASUA had no capacity to sue. Id. 736-737. The court went on to rule that ASUA also had no right to contract for the services of an attorney because state law required all state agencies to use the attorney general's office.

From the foregoing facts, it appears that whatever powers (as distinguished from rights) ASUA may have are derived from, and thus may not transcend, the administrative powers of the Board of Regents for the government of the institutions under its jurisdiction. ASUA has no existence separate and apart from the University of Arizona. See University of South Florida Student Government v. Trundle, 336 So.2d 488 (Fla.App. 1976), cert. den. 348 So.2d 954. The Board of Regents is a state agency, . . . . Id. at 738.

The Trundle case relied on by the Arizona court involved a claim for damages by a student who alleged that she had been injured as a result of the negligence of an instructor in a self-defense class sponsored by the student government at the University of Florida. The appeal was from the denial of a motion by the student government defendant to quash service of process made upon its president.

Much of the argument before this court has centered upon whether an unincorporated association can be sued and served as a separate entity. . . . We find it unnecessary to resolve this issue because we

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have concluded that the student government association is simply a part of the University.

Under Chapter 240, Florida Statutes, the Board of Regents is charged with the responsibility of operating the state's university system. Pursuant to Fla. Stat. Section 240.042(2)(a) (1974), the Board of Regents is empowered to establish rules under which the state's university system shall be managed. Student Government is authorized under Board of Regent Rule 6C-6.12 with the proviso "that ultimate authority for university affairs rests with the administration of each university." The president of the university maintains a veto over the budgeted expenditures of Student Government from student activity fees. Fla. Stat. Section 240.0951 (1974). While Student Government is granted certain freedoms, the final authority for its activities necessarily rests with the president of the university.

Thus, it appears that the University of South Florida Student Government has no existence separate and apart from the University of South Florida.<sup>1</sup> Jurisdiction over the state or the University cannot be acquired by service of the president of Student Government.

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<sup>1</sup> Tactically, the question of whether Student Government is an instrumentality of the state may be exceedingly important in this case because appellee's injury occurred at a time when the state maintained sovereign immunity. University of South Florida Student Government v. Trundle, supra, at 489.

In Sellman v. Baruch College of City University of New York, 482 F.Supp. 475 (S.D. N.Y. 1979), an action was brought under 42 U.S.C. Section 1983 and directly under the federal constitution to have declared void as violative of the First, Fifth and Fourteenth Amendments to the United States

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Constitution a provision of the Baruch College student government constitution requiring candidates for elective position to be registered for a minimum of twelve credits and to maintain a grade average of 2.5. The plaintiff claimed that the actions of his fellow students in ratifying the student constitution, and of the Election Committee in enforcing it, constituted state action. In deciding whether there was "state action" for purposes of the Fourteenth Amendment and whether the deprivation of rights was "under color of state law" for purposes of Section 1983, the court examined the facts to see if the "'State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity. . . .'" [Footnote omitted]

Id. at 478, quoting from Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

The facts in the instant case appear even more compelling than those in Burton, supra. Although City officials did not write or ratify the challenged provisions of the student constitution, the City was nevertheless a "joint participant" in the challenged activity. Baruch College is a public institution, built for public purposes, funded with public money, and staffed by public employees. Although the student government enjoys a measure of autonomy, nevertheless it is a creature of governmental agencies. Its branches are advised and guided by faculty members; its constitution is required to be compatible with guidelines fostered by the Board of Higher Education; the Dean of Students, a government employee, is the final arbiter of election disputes. The student government receives money, both to cover its operating expenses and to fund the activities it supervises, from mandatory student fees collected by the College from the entire student body. Finally, its meetings are held on campus during hours specifically set aside by the College for student activities; thus, it may be presumed that both the College and the students derive benefit from this interlocking relationship. Although none of these factors, standing alone, would constitute the requisite degree of state involvement, in combination, they do. The

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plaintiff has met the threshold requirement. The state is sufficiently involved in the governance and control of Baruch College that the actions of its student government may be attributed to the state itself; the policies of the student government are held to the same constitutional standards as those that apply to the state. [Footnotes omitted.] Id. at 478-479.

(Emphasis added.)

An analysis of the Student Government Association at Southwest Missouri State University in light of these holdings must begin with an examination of the facts and circumstances.

The Student Government Association is recognized by Southwest Missouri State University as "the official body representing the students of Southwest Missouri State University." Article I, Section 4 of the SGA Constitution. The following description of the characteristics and functions of the SGA are taken not only from its constitution but also from the official publications of the University, namely, the Student Organization Handbook 1986-1987; Bear Facts 1986-87 and the Southwest Missouri State University Bulletin 1986. Facts were also obtained in discussions with the faculty advisor to the SGA.

The SGA provides the means by which students can participate in campus governance, in student discipline, in the management of student activities and in academic decision making. It has a constitution approved by the president of the University, on behalf of the Board of Regents, and which can be amended only with his approval. It is not incorporated. The University provides that all undergraduate students are automatically members of the SGA and officially encourages them to participate in the SGA activities. In fact, the University's statement of "Students Rights and Responsibilities" includes the "[r]ight to be represented in student affairs through their constitutional government and various committees of the University." Bear Facts 1986-87, p. 28. The SGA is financed by moneys from the University's general fund as appropriated by the Board of Regents.

According to its constitution, the SGA has executive, legislative and judicial branches. The executive branch includes the president, vice-president and president of the

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senior class as well as commissions appointed by the president of the SGA. These officials are elected by the student body with the senior class electing its own president.

The legislative branch is called the Student Senate. It is made up of representatives of various portions of the student body who are elected by those students. Among other things, the Student Senate budgets and allocates funds assigned to the SGA by the University; selects faculty or administration advisors in addition to the vice-president for student affairs who is the permanent advisor; approves constitutions of organizations on campus and amendments thereto and reviews the constitutions every two years; and, selects student officials to manage or direct any student activities funds including the University newspaper and yearbook.

The judicial branch is called the Campus Judicial Board whose purpose it is to "provide students with representative voice in the regulation of their actions and to encourage their participation in an understanding of the administration of justice." Article IV, Section 2 of the SGA Constitution. This board is composed of five students nominated by a group of professors, students and administrative personnel. The nominating group is appointed by the president of the University. The nominees are approved by the Senate with a chief justice being chosen from among them. All student organizations and all students enrolled in the University are subject to the jurisdiction of this Board. Besides having the power to interpret the SGA Constitution and try impeachment charges against SGA officers, it has appellate and original jurisdiction in various cases involving conflicts between student organizations and in cases of offenses against University regulations.

The SGA is particularly involved in the regulation of student organizations. All student organizations must be registered and have articles of registration before they can receive the privileges accorded to student organizations. These privileges include the use of campus facilities, bulletin boards, University support services, campus facilities and services for the generation of funds; the right to meet and hold activities on campus; the right to distribute and receive mail through the Student Life office; and the right to receive the assistance of Student Life and Student Activities staffs in planning activities. Student Organization Handbook 1986-1987, p. 3. These organizations are subject to the constitution of the SGA and must have registration approved by the SGA after a recommendation by the Dean of Student Life and a Board of Registration. Organizations may be suspended or have regis-

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tion withdrawn by action of the Campus Judicial Board or the Dean of Student Life if members or sponsored activities violate the laws of the community, the policies of the University or the organization's own constitution. The suspension can be lifted only with the concurrence of the judicial authority which imposed it and the approval of Student Life and the Student Government Association.

The SGA grants a certain number of "Student Government Association Scholarships" to freshmen and upper classmen based on good scholastic standing and financial need.

The Board of Regents and the University actively support the SGA and encourage student participation in it. They see the SGA as playing an essential part of the University's mission to mold educated citizens of its students.

Student organizations. Student organizations are an integral part of the SMS experience. These organizations make significant contributions to the intellectual, cultural, recreational, social, and spiritual life of the University. Students are encouraged to participate in the activities of at least one organization and may organize for any purpose consistent with the educational objectives of the University.

Each undergraduate student is a member of the Student Government Association. Through the Student Senate students participate in campus government, in the management of student activities and affairs, in student discipline, and in academic decision making. Southwest Missouri State University Bulletin 1986, at page 41.

(Emphasis added.)

An analysis of these facts and circumstances leads to the conclusion that the SGA is a part of the University and in some of its functions plays an integral part of the plan by which the Board of Regents governs the University. The Board of Regents of Southwest Missouri State University is, of course, a "public governmental body" under the Sunshine Law, because it is an administrative governmental entity created by state statute to govern the University. See Sections 174.040, 174.110, and 174.120, RSMo 1986, and Tribune Publishing Company v. Curators of University of Missouri, supra, at 584.

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Section 174.120 provides:

Each state teachers college shall be under the general control and management of its board of regents, and the board shall possess full power and authority to adopt all needful rules and regulations for the guidance and supervision of the conduct of all students while enrolled as such; to enforce obedience to the rules; to invest the faculty with the power to suspend, or expel any student for disobedience to the rules or for any contumacy, insubordination, dishonesty, drunkenness or immoral conduct; . . . ; and to have the entire management of the college, including qualifications for admission.

(Emphasis added.)

The board has delegated either expressly or tacitly some of its authority over student affairs to administrative officers such as the president of the University. The president in turn has exercised that authority by agreeing with the SGA to allow that organization to be the only entity which represents all the students' interests before the Board of Regents and the University. The president has also agreed, by his approval of the SGA constitution on behalf of the Board of Regents, to allow the SGA to participate in the "governance" of the University. See, for example, the functions of the Student Senate and the Campus Judicial Board, as described earlier in this opinion.

Recognition that the SGA plays a role in its "governance" has been made explicit in the above-quoted material from page 41 of the official Southwest Missouri State University Bulletin 1986 as well as in the following:

Governance. Southwest Missouri State University is under the general control and management of a six-member Board of Regents which is charged with the responsibility and authority to adopt administrative policies and procedures relevant to the management of the University. The President is the chief executive officer of the University, responsible to the Board of Regents for the administration of institutional policies and operations. The senior administrative officers of the University serve as an

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advisory body to the President and are responsible for specific operational divisions of the University . . . . The Student Government Association provides the means by which students can participate in campus governance, in student discipline, and in the management of student activities.

To formulate policy, to facilitate decision making, and to promote a spirit of collegiality, the University is committed to participatory governance and to an open system of communication throughout the University. Southwest Missouri State University Bulletin 1986, at page 10.

(Emphasis added.)

Whether the records, meetings and votes of the SGA must be open under the Sunshine Law is an issue which must be decided under the principles set forth in Tribune Publishing Company v. Curators of University of Missouri, supra. In that case, the court held that, absent a delegation of policy-making or rule-making authority ("governing authority") to executive officers of the University of Missouri, those officers were not public governmental bodies under the Sunshine Law and their records were not open under that law unless and until they became records of the Board of Curators by submission to that board for informational or decisional purposes. Id. at 585-586.

There is not a scintilla of evidence that the "internal audit reports" were ever filed with or became a part of the records of the Board of Curators. More importantly, there is not a scintilla of evidence that President Olson and his staff had either de jure authority delegated by the Board of Curators or de facto authority by grace of the Board of Curators to make policy decisions, or issue rules or regulations to effect changes that might be indicated by the "internal audit reports". Short of presentation to the Board of Curators either for informational or decisional purposes, the "internal audit reports" did not rise to the level of "public records" of a "public governmental body" within the ambit of the "Sunshine Law". Id. at 586.

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The record is devoid of any evidence that either the appointing authorities or the "hospital task force" exercised de jure or de facto authority emanating from the Board of Curators to effect policy changes or rules or regulations governing the operation of the "University Hospital", or, concomitantly, that its report was ever filed with or submitted to the Board of Curators for informational or decisional purposes. As garnered from the record it is implicit that the "hospital task force" was nothing more than an ad hoc fact-finding committee to assist the administrative hierarchy of the University in evaluating whether policy, rule or regulation changes should be recommended to the Board of Curators affecting the operation of the "University Hospital". As previously noted, the "hospital task force report" never ripened into fruition. The "hospital task force report", like the "internal audit reports", never rose to the level of "public records" of a "public governmental body" within the ambit of the "Sunshine Law". Id. at 586.

If decisional authority beyond the perimeters of policies, rules and regulations previously formulated and promulgated by the Board of Curators is delegated by the Board of Curators to persons or committees in designated instances, then their meetings and reports take on a different complexion for purposes of ascertaining whether the "Sunshine Law" comes into play.<sup>4</sup> By the same token, de facto authority assumed and exercised by persons or committees at the administrative level, and, tacitly approved, summarily accepted or "rubber stamped" by the Board of Curators, takes on a different complexion for purposes of ascertaining whether the "Sunshine Law" comes into play. Otherwise the "Sunshine Law" could be effectively foiled.

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<sup>4</sup> Section 610.010(2) was amended in 1978 (RSMo 1978) to include "any committee appointed under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities" in the definition of "public governmental body." Id. at 587.

In light of the above, this office concludes that each of the specific functions of the SGA would have to be examined in light of these principles to determine if the pertinent records, meetings and votes are open. In addition, the provisions of subsections 1, 3 and 4 of Section 610.025 allowing for closed records, meetings and votes must be considered to determine if they are applicable in any specific instance.

#### CONCLUSION

Therefore, it is the opinion of this office that, while the Student Government Association of Southwest Missouri State University is not normally a "public governmental body" as defined in Section 610.010(2), RSMo 1986, the provisions of Sections 610.010 to 610.030, RSMo 1986, applicable to "public governmental bodies" may become applicable to the Student Government Association when it participates by way of delegation from the Board of Regents in decisional authority beyond the perimeters of policies, rules and regulations previously formulated and promulgated by the Board of Regents or when the Student Government Association exercises de facto authority tacitly approved or summarily accepted by the Board of Regents.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

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<sup>1</sup> Section 610.010(2) has been revised by House Committee Substitute for Senate Substitute for Senate Bill No. 2, 84th General Assembly, First Regular Session, effective September 28, 1987. Such section as enacted by this bill provides:

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610.010. As used in sections 610.010 to 610.030 and 610.100 to 610.115, unless the context otherwise indicates, the following terms mean:

\* \* \*

(2) "Public governmental body": any legislative, administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, board of regents or board of curators of any institution of higher education, supported in whole or in part from state funds, advisory committee or commission appointed by the governor by executive order, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body. The term "quasi-public governmental body" means any corporation organized or authorized to do business in this state under the provisions of chapter 352, 353, or 355, RSMo, or unincorporated association which (A) performs a public function, and which (B) has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; except urban redevelopment corporations organized or

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authorized to do business under the provisions of chapter 353, RSMo, which are privately owned, operated for profit, and do not expend public funds;

\* \* \*

The revisions to Section 610.010(2) by this bill do not affect the conclusion reached herein.

<sup>2</sup>In Carter v. Fench, 322 So.2d 305 (La. App. 1975); aff'd., 325 So.2d 277 (La. 1976) the court held that a student government association was subject to Louisiana's open records law because it received public funds. Under Louisiana law, receipt of public funds made records pertaining to those funds open to the public whether the entity receiving them was itself public or private. LSA-R.S. 44:1. Id. at 307. There was no discussion helpful to those types of issues relevant under Missouri's Sunshine Law.

In Marston v. Gainesville Sun Publishing Co., Inc., 341 So.2d 783 (Fla.App. 1976), cert. denied, 352 So.2d 171 (1977), the court held that student disciplinary hearings of the University of Florida's Honor Court were not open to the public under the public meetings law because to so hold would negate the purpose and effect of a more recent statute limiting access to records which the university system maintains on students to the student, the parent or guardian of the student, and to certain members of the professional staff of the university. Id. at 785-786. The court expressly withheld any ruling on "whether disciplinary sessions of the Honor Court would otherwise constitute 'meetings of . . . [a] board or commission of . . . [a] state agency or authority.' Sec. 286.011(1), F.S. 1975." Id. at 786.

ASSESSORS: The Missouri State Tax Commission and  
LAND SURVEYORS: county assessors can engage in  
STATE TAX COMMISSION: cadastral mapping to the extent  
under the law without being registered as land surveyors in  
Missouri.

September 4, 1987

OPINION NO. 71-87

The Honorable Dennis W. Smith  
Senator, District 30  
State Capitol Building, Room 328  
Jefferson City, Missouri 65101



Dear Senator Smith:

This opinion is in response to your question asking:

Whether or not cadastral mapping by  
the Missouri Tax Commission and the County  
Assessors constitutes the practice of land  
surveying as defined in the statutes?

Cadastral, when referring to maps or surveys, is defined as showing or recording property boundaries, subdivision lines, buildings and other details. See Webster's Third New International Dictionary.

Chapter 327, RSMo 1986, provides for the registration of land surveyors. Section 327.281, RSMo 1986, provides:

327.281. Unauthorized practice prohibited. -- No person, including any duly elected county surveyor, shall practice as a land surveyor in Missouri as defined in section 327.272 unless and until there is issued to him a certificate of registration or a certificate of authority certifying that he has been duly registered as a land surveyor in Missouri, and unless such certificate has been renewed as hereinafter specified.

Section 327.272, RSMo 1986, which defines practice as a land surveyor, provides:

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Section 327.272. Practice as land surveyor defined. -- Any person practices in Missouri as a "land surveyor" who renders or offers to render, or holds himself out as willing or able to render, any service comprising the determination of the location of land boundaries and land boundary corners, the preparation of maps showing the shape and area of tracts of land and their subdivisions into smaller tracts and showing access thereto, or the preparation of official plats, or maps, of said land in this state; or who uses the title "registered land surveyor" or "land surveyor" or the word "surveyor" alone or preceded by any word indicating or implying that he is or holds himself out to be a land surveyor, or who shall by word or words, letters, figures, degrees, titles, or other description indicate or imply that he is a land surveyor or is willing or able to practice land surveying.

Chapter 137, RSMo 1986, provides the statutory scheme for the assessment of property for purposes of taxation. Section 137.185, RSMo 1986, provides:

Section 137.185. Tracts less than one-sixteenth of a section. -- 1. In all cases where any person . . . may . . . divide any tract of land into parcels less than one-sixteenth part of a section or otherwise, in such manner that such parcels cannot be described in the usual manner of describing lands in accordance with the surveys made by the general government, it shall be the duty of such person . . . to cause such lands to be surveyed and a plat thereof made by a surveyor . . . which plat shall particularly describe and set forth the lots or parcels of land surveyed, as aforesaid; . . . provided, that whenever . . . tracts or parcels of land less than one-sixteenth of a section . . . outside of the limits of any incorporated city . . . have been conveyed without having been surveyed and platted . . . as herein provided; the [county] commission may require the county surveyor . . . to survey

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and plat such . . . tracts of land . . .  
at the expense of the owner of such tracts  
of land. . . .

\* \* \*

Section 137.205, RSMo 1986, provides:

137.205. Assessor to have free access to plats and maps -- board to compare -- omissions. -- The assessor shall have free access to all landplats and maps during the time of assessment with a view to ascertain what lands are taxable; and upon the return of the assessor's books to the board of equalization, the said board shall compare the same with the plats and maps of the county; and in all cases where any lands have been omitted by the assessor, they shall be placed in the assessor's books and assessed as other lands are required to be assessed by this chapter.

Section 137.210, RSMo 1986, provides:

137.210. Assessor to examine and compare lists -- assessor's book. -- The assessor shall examine and compare the list of property delivered by individuals with the plats and maps, and after diligent efforts to ascertain all taxable property in his county shall make a complete list of all the real and tangible personal property taxable by his county to be called the assessor's book.

Section 137.215, RSMo 1986, provides for the assessor's book to be divided into two parts, one of which shall be "the land list." See also Section 137.220, RSMo 1986.

Section 138.410, RSMo 1986, provides for the State Tax Commission to exercise general supervision over all the assessing officers of this state. Such section provides in part:

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138.410. General supervision -- attorney general and prosecuting attorney to assist in enforcement. -- 1. The commission shall exercise general supervision over all the assessing officers of this state, over county boards of equalization and appeal in the performance of their duties under this chapter and all other laws concerning the general property tax and shall institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with the provisions of this chapter, and of all laws relating to the general property tax.

\* \* \*

In State ex rel. Cassilly v. Riney. 576 S.W.2d 325 (Mo. banc 1979), the Missouri Supreme Court interpreted this section as providing the State Tax Commission has the duty, responsibility and right to exercise general supervision over all county assessing officers and the county boards of equalization. The court further stated the commission has powers commensurate with its responsibility.

The key issue appears to be whether Section 327.281 prohibits the Missouri State Tax Commission and county assessors from engaging in cadastral mapping without using the services of a registered land surveyor.

In 1968, this office faced a similar issue with respect to county surveyors. At that time, Section 344.020, RSMO 1959, provided:

It shall be unlawful for any person to practice, or offer to practice, or to in any manner advertise or indicate to the public that he is engaged in, or will engage in the practice of land surveying in this state, without first registering with the state board of registration for architects and professional engineers, as a land surveyor.

This office in 1968 opined that county surveyors when duly qualified may perform surveys for the general public within the county for which they were elected without being a duly

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registered land surveyor. Missouri Attorney General Opinion No. 146, Niewoehner, 1968 (now withdrawn). Our opinion was based in part on Hayes v. City of Kansas City, 241 S.W.2d 888 (Mo. 1951) wherein the court stated:

[6] "The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. . . ."

Id. at 892. In 1969, the General Assembly repealed Section 344.020, RSMo 1959, and enacted Section 327.281. Such section as enacted in 1969 provided:

No person, including any duly elected county surveyor, shall practice as a land surveyor in Missouri as defined in section 327.272 unless and until the board has issued to him a certificate of registration or a certificate of authority certifying that he has been duly registered as a land surveyor in Missouri, and unless such certificate has been renewed each year as hereinafter specified.

[Emphasis added.] See Missouri Attorney General Opinion No. 405, Caskey, 1971 and Missouri Attorney General Opinion No. 96, Myers, 1972, copies of which are enclosed.

Based upon the principle set forth in Hayes v. City of Kansas City, supra, and the reasoning in the opinions referenced above, we conclude the the Missouri State Tax Commission and county assessors can engage in land surveying to the extent necessary to perform their duties under the law. If cadastral mapping is necessary for them to perform their duties, they may do so without being registered as land surveyors in Missouri.

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CONCLUSION

It is the opinion of this office that the Missouri State Tax Commission and county assessors can engage in cadastral mapping to the extent necessary to perform their duties under the law without being registered as land surveyors in Missouri.

Very truly yours,

*William L. Webster*

WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Opinion No. 405, Caskey, 1971.  
Opinion No. 96, Myers, 1972.



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
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October 2, 1987

OPINION LETTER NO. 72-87

The Honorable Glenn H. Binger  
Representative, District 54  
State Capitol Building, Room 407-B  
Jefferson City, Missouri 65101

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Dear Representative Binger:

This opinion letter is in response to your question asking:

Does a fire protection district have the power, under Chapter 321, RSMo, by a properly enacted ordinance, to require a municipality to include fire hydrants when installing water lines through the district?

The information included with your opinion request indicates that your question relates to a water line installed by a city outside of the city's boundaries and within the jurisdiction and boundaries of a fire protection district.

Chapter 321, RSMo, recites a broad delegation of powers to fire protection districts in the areas of fire protection and prevention. Section 321.220, RSMo 1986, gives the board of directors of such districts the following powers, among others:

321.220. Powers of board. -- For the purpose of providing fire protection to the property within the district, the district and, on its behalf, the board shall have the following powers, authority and privileges:

\* \* \*

(12) To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of

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this state, necessary for the carrying on  
of the business, objects and affairs of the  
board and of the district, and refer to the  
proper authorities for prosecution any  
infraction thereof detrimental to the  
district. ...

\* \* \*

(14) To have and exercise all rights  
and powers necessary or incidental to or  
implied from the specific powers granted  
herein. Such specific powers shall not be  
considered as a limitation upon any power  
necessary or appropriate to carry out the  
purposes and intent of this chapter;

\* \* \*

In Wellston Fire Protection District of St. Louis County v. State Bank and Trust Company of Wellston, 282 S.W.2d 171 (Mo.App. 1955), the court examined the question of a fire protection district's authority to regulate and control the construction of buildings. In recognizing the need for certainty in this area, the court stated:

After analysis of the fire protection district statute, the evident purpose thereof, the broad scope of the law, the resting of police power in a district created pursuant thereto, and the state of confusion which could be precipitated if both the city and the district attempted to function in the same field, we hold that the Legislature intended to and did withdraw the authority from the city to regulate and control construction of buildings and other structures with respect to preventing and protecting against fires and lodged that authority in the district.

Id. at 176. The court in Wellston indicated that the fire protection district has paramount authority with respect to fire prevention and protection.

In Community Fire Protection District of St. Louis County v. Board of Education of Pattonville Consolidated School District R-3, 315 S.W.2d 873 (Mo.App. 1958), the issue presented was whether the right of a school district to erect a

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school building could in any way be limited by an ordinance of a statutory fire district. The court concluded that the school district must comply with the ordinances of the fire district.

It is, therefore, the opinion of this office that a fire protection district does have the power under Chapter 321, RSMo 1986, by properly enacted ordinance, to require a municipality to include fire hydrants when installing water lines through the district.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

STATE AUDITOR:  
DEPARTMENT OF MENTAL HEALTH:

1. The State Auditor is not permitted to conduct performance audits of the Department of Mental Health and its facilities, but may postaudit the financial condition of the Department and its facilities. 2. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to the following records of the Department of Mental Health in its audit examination of the Department and its facilities: A. Patient medical records, except drug and alcohol abuse records subject to federal confidentiality regulations; B. Physician peer review minutes or records where review of patient care was the subject of the meeting; C. Abuse and neglect investigation reports; D. Records of patient death cases. 3. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to records relating to litigation pending against the Department of Mental Health in its audit examination of the Department and its facilities. However, where the doctrine of attorney-client privilege or work product privilege is properly assertable in pending or imminent litigation, the State Auditor is not entitled to access to those records. 4. Any of the foregoing records provided by the Department of Mental Health and its facilities to the State Auditor shall not be divulged by the State Auditor in such a way to reveal personally identifiable information, and the Office of the State Auditor is reminded of the confidentiality provisions of Sections 29.070 and 29.080, RSMo 1986.

October 5, 1987

OPINION NO. 74-87

The Honorable Margaret Kelly, CPA  
State Auditor  
State Capitol Building, Room 224  
Jefferson City, Missouri 65101

and

C. Keith Schafer, Ed.D.  
Director, Department of Mental Health  
Post Office Box 687  
Jefferson City, Missouri 65102



The Honorable Margaret Kelly, CPA  
C. Keith Schafer, Ed.D.

Dear Mrs. Kelly and Dr. Schafer:

Each of you has posed questions in regard to the authority of the Office of the State Auditor to receive access to records of the Department of Mental Health in an audit examination of the Department and its facilities. Because of the similarities in the questions posed, we have combined your requests into one opinion. The questions posed by State Auditor Kelly are as follows:

An opinion is requested as to whether or not the Office of the State Auditor is entitled to receive access to the following records of the Department of Mental Health in its audit examination of the Department and its facilities:

1. Patient medical records;
2. Physician peer review minutes or records where review of patient care was the subject of the meeting;
3. Abuse and neglect investigation reports;
4. Records relating to litigation pending against the Department;
5. Records relating to potential litigation against the Department (for example, records of patient death cases).

The questions posed by Dr. Schafer are as follows:

1. Does the State Auditor have the authority to engage in a performance audit of the Department of Mental Health, which audit would include review of Department records, the substance of which concern health care issues of clients and performance of staff rather than financial issues?
2. If the State Auditor has the above authority to engage in performance auditing, does the State Auditor have a right of access to the personal medical files of patients of the Department of Mental Health? These records include physician

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and nursing notes, social histories of the patient, pharmacy records, progress notes by developmental or hospital attendants indicating first-hand observations of clients and professional staff summaries of client progress which include their recommendations for changes in the individual patient treatment plans.

3. Does the State Auditor have a right of access to information which is protected by attorney-client privilege or work product privilege because the matter is in litigation, or to information which, if disclosed to the public, would compromise the litigation strategy of the state?

If the State Auditor has a right of access to such documents, is that right to access affected where the State Auditor has refused to ensure that such information will not be publicly disclosed?

4. Does the State Auditor have a right of access to the disciplinary files which result from the physician peer review process, which files are protected in section 537.035, RSMo?

5. Does the State Auditor have a right of access to the abuse and neglect investigation reports protected from disclosures in section 630.167? If the Auditor has a right of access, is that access to the original document which contains names of informants and complainants, or is that access to summaries of the investigation reports which exclude personally identifiable information?

Article IV, Section 13 of the Missouri Constitution refers to the duties of the State Auditor. Such section provides:

The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once

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annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

Thus, under the above constitutional provision, and among her other duties, the State Auditor shall postaudit the accounts of all state agencies. In addition, she shall make all other audits and investigations required by law. In this regard, under the provisions of Section 29.200, RSMo 1986, the State Auditor has a duty to postaudit the accounts of the Department of Mental Health and its facilities. Section 29.130, RSMo 1986, provides in part that the State Auditor shall have free access to all offices of the state for the inspection of such books, accounts and papers "as concern any of his duties." Under Section 29.235, the State Auditor may require the production of "necessary papers, documents and writings." (Emphasis added.) Sections 29.070 and 29.080, RSMo 1986, provide in part that audit examiners may not reveal the condition of any office examined or any information received in the course of any examination of any office to anyone except the State Auditor.

The statutory provisions relating to the records of the Department of Mental Health are found in Chapter 630, RSMo 1986. In this regard, Section 630.080, RSMo 1986, relating to access to records in the Department of Mental Health by the State Auditor provides as follows:

The state auditor shall have access to all records maintained and established by the department. Any confidential records shall not be divulged in such a way to reveal personally identifiable information.

(Emphasis added.)

There are also statutory provisions relating to patient medical records. In this regard, Section 630.140.1, RSMo 1986, provides as follows:

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1. Information and records compiled, obtained, prepared or maintained by the residential facility or day program operated, funded or licensed by the department or otherwise in the course of providing services to either voluntary or involuntary patients, residents or clients shall be confidential.

However, Section 630.140.3(4), RSMo 1986, provides that the facilities or services may disclose information and records under certain conditions which reads as follows:

(4) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, program evaluations or similar studies; provided, that such personnel shall not identify, directly or indirectly, any individual patient, resident or client in any report of such research, audit or evaluation, or otherwise disclose patient, resident or client identities in any manner;

(Emphasis added.)

There are also statutory provisions relating to patient death records. Section 630.145.1 and 2, RSMo 1986, provide as follows:

1. Notwithstanding the provisions of section 630.140, a residential facility or day program operated, funded or licensed by the department may release to a patient's or resident's next of kin, attorney, guardian or conservator, if any, the information that the person is presently a patient, resident or client in the facility or program, or that the person is seriously physically ill, and shall notify a voluntary patient's or resident's next of kin, attorney, guardian, or conservator or any other person who may be responsible for the costs incurred by such patient or resident, of the admittance of such patient or resident.

2. Upon the death of a patient or resident, the facility shall notify his

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next of kin, guardian or conservator, if any, about the death and its cause.

The statutory provisions relating to mistreatment of patients are found in Sections 630.155 through 630.168, RSMo 1986. Section 630.155.2, RSMo 1986, provides that patient, resident or client abuse or neglect is a class A misdemeanor. Section 630.160.2, RSMo 1986, provides that furnishing unfit food to patients, residents or clients is a class A misdemeanor. Section 630.165.1, RSMo 1986, provides in part that when various individuals have reasonable cause to believe that a patient, resident or client of a facility, program or service has been abused or neglected, he shall immediately report or cause a report to be made to the Department. Section 630.167, RSMo 1986, relates to investigations and investigation reports. In this connection, Section 630.167.3 and 4, RSMo 1986, provides as follows:

3. Reports shall be confidential, shall not be deemed a public record, and shall not be subject to the provisions of section 109.180, RSMo, or chapter 610, RSMo; except that, all such reports shall be open to the parents or other guardian of the patient, resident, or client who is the subject of such report. The name of the complainant or any person mentioned in the reports shall not be disclosed unless such complainant or person specifically requests such disclosure or unless a judicial proceeding results therefrom.

4. Anyone who makes a report pursuant to this section or who testifies in any administrative or judicial proceeding arising from the report shall be immune from any civil or criminal liability for making such a report or for testifying except for liability for perjury, unless such person acted in bad faith or with malicious purpose.

Section 630.168, RSMo 1986, provides in part that in situations of suspected patient or resident abuse which results in physical injury, the head of the facility or program shall, as specified in the Department's rules and regulations, notify local law enforcement authorities and cooperate fully with any investigation by them.

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#### Performance Audit

One of the issues posed in the opinion request by Dr. Schafer is whether or not the State Auditor has the authority to engage in a performance audit of the Department of Mental Health, which audit would include review of Department records, the substance of which concern health care issues of clients and performances of staff rather than financial issues.

In the case of Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974), the Missouri Supreme Court held in part that in conducting a postaudit of the Department of Revenue, the State Auditor who was furnished with totals, shown on faces of tax returns, did not need access to the identity of the taxpayers for purposes of his postaudit, and thus access to the taxpayers' sales, income, and intangible tax returns was properly withheld from the State Auditor pursuant to a statute providing for confidentiality of such returns, and such statutes do not conflict with the constitutional and statutory provisions governing the duty and authority of the State Auditor. In reaching its decision, the Court also made the comment at 511 S.W.2d 783 that it was not the business of the State Auditor to judge the performance of the Department of Revenue. Subsequently, in Attorney General Opinion No. 117, Keyes, 1977, a copy of which is enclosed, this office held that the State Auditor had access to information contained in individual personnel files maintained at the Department of Mental Health and its facilities even though parts of such files may be confidential to the extent that such files relate to the duty of the State Auditor to postaudit the financial condition of such institutions.

There are no relevant decisions subsequent to Director of Revenue v. State Auditor, supra. Thus, the State Auditor has no power to do performance audits consistent with that judicial teaching.

With the foregoing in mind, we will now consider the issues relating to patient medical records, patient death records, and abuse and neglect investigation reports.

#### Patient Medical Records

It is our understanding that patient medical records include physician and nursing notes, social histories of the patient, pharmacy records, progress notes by developmental or hospital attendants indicating firsthand observations of clients, and professional staff summaries of client progress which include their recommendations for changes in the indi-

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vidual patient treatment plans. The presumption is made that the medical records do not include the records and files maintained in any court proceeding under Chapter 632, RSMo 1986.

In analyzing the foregoing statutory provisions, there are two provisions in Section 630.080, RSMo 1986. The first provision is that the State Auditor shall have access to all records maintained and established by the Department. The second provision is that any confidential records shall not be divulged in such a way to reveal personally identifiable information. In this regard, we must give to each provision some meaning and not presume that the Legislature intended the language in the second provision to be superfluous and meaningless. Bussmann Manufacturing Company v. Industrial Commission, Division of Employment Security, 335 S.W.2d 456, 460 (Mo.App. 1960). If in the first provision the State Auditor shall have access to all records, the second provision requires an interpretation that any confidential records provided to the State Auditor shall not be divulged by the State Auditor in such a way to reveal personally identifiable information. This interpretation is also consistent with the provisions of Section 630.140, RSMo 1986, relating to the confidentiality of patient records of the Department of Mental Health. In this connection, Section 630.140.3(4), RSMo 1986, indicates that the facilities or services may disclose information and records to qualified personnel for the purpose of conducting management audits, financial audits, program evaluations or similar studies; provided that such personnel shall not identify, directly or indirectly, any individual patient, resident or client in any report of such research, audit or evaluation, or otherwise disclose patient, resident or client identities in any manner. The rules of statutory construction require that statutes relating to the same subject are to be considered together and harmonized if possible so as to give meaning to all provisions of each. State ex rel. Lebeau v. Kelly, 697 S.W.2d 312 (Mo.App. 1985). Therefore, when the provisions of Section 630.140.3(4), RSMo 1986, are harmonized with the provisions of Section 630.080, RSMo 1986, the statutory language of each statute operates as a prohibition upon the divulgence of personally identifiable information by the State Auditor and not upon the Department of Mental Health.

There is, however, an exception to the conclusion that patient records must be made available to the State Auditor. The Department maintains drug and alcohol abuse records to which are applicable the confidentiality provisions of Section 408 of Pub. L. 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1175) as amended by Section 303 of Pub. L. 93-282 (88 Stat. 137) and Section 333 of Pub. L. 91-616, the Comprehensive

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Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4582), as amended by Section 122(a) of Pub. L. 93-282, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act Amendments of 1974 (88 Stat. 131). As authorized by subsection (g) of Sections 408 and 333, the federal government has issued regulations implementing the provisions of those sections. Sections 408(f) and 333(f) provide for fines for violations of those regulations. 42 C.F.R. Section 2.53(b) provides:

(b) Financial and administrative records. Where program records are reviewed by personnel who lack either the responsibility for, or appropriate training and supervision for, conducting scientific research, determining adherence to treatment standards, or evaluating treatment as such, such review should be confined as far as practicable to administrative and financial records. Under no circumstances should such personnel be shown caseworker or counsellor notes, or similar clinical records. Programs should organize their records so that financial and administrative matters can be reviewed without disclosing clinical information and without disclosing patient identifying information except where necessary for audit verification.

(Emphasis added.)

In case "patient identifying information" must be revealed, Section 2.54 sets forth the required procedure to be followed by the custodian of the records and the auditing examiner. This procedure places certain requirements on the auditing examiner including certain written assurances about the confidentiality of patient identifying information such as the "specific purpose for which a record of patient identifying information is being retained by or on behalf of the examiner . . . ." 42 C.F.R. Section 2.54(c)(2). It would be inappropriate for this office to advise the personnel of the Department of Mental Health and the State Auditor's Office to incur liability for fines by violating these regulations. Furthermore, this office would advise the Department of Mental Health and the State Auditor not to reveal or examine "caseworker or counsellor notes, or similar clinical records" until there has been a determination by a court of law that they would not incur any liability for violation of the regulations. 42 C.F.R. Part 2, Subpart E,

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provides a procedure whereby a court order under Section 408(b)(2)(C) and Section 333(b)(2)(C) can be obtained allowing for disclosure for "good cause."

With the exception of the drug and alcohol abuse records noted above, we conclude that the Office of the State Auditor is entitled to access to patient medical records of the Department of Mental Health to the extent that such records relate to the duty of the State Auditor to postaudit the financial condition of the Department and its facilities as discussed in the "Performance Audit" section of this opinion. However, any patient medical records provided to the State Auditor by the Department shall not be divulged by the State Auditor in such a way to reveal personally identifiable information.

#### Patient Death Records

Another issue posed in the opinion requests is whether or not the Office of the State Auditor is entitled to receive access to patient death records.

The provisions of Section 630.145.1, RSMo 1986, indicate that notwithstanding the provisions of Section 630.140, a residential facility or day program operated, funded or licensed by the Department may release to a patient's or resident's next of kin, or other responsible parties, the information that the person is presently a patient, resident or client in the facility or program, or that the person is seriously physically ill, and shall notify a voluntary patient's or resident's next of kin, or other party responsible for the costs incurred by such patient or resident, of the admittance of such patient or resident. Also, upon the death of a patient or resident, the facility shall notify his next of kin, guardian or conservator, if any, about the death and its causes. Thus, under the plain language of the provisions of Section 630.145, RSMo 1986, there is no prohibition against the disclosure of patient death records to the Office of the State Auditor.

Also, as we have previously suggested, the statutory provisions of Section 630.080, RSMo 1986, provide that the State Auditor shall have access to all records maintained and established by the Department. In addition, Section 630.140.3(4), RSMo 1986, indicates that the facilities or services may disclose information and records to qualified personnel for the purpose of conducting management audits, financial audits, program evaluations or similar studies; provided, that such personnel shall not identify, directly or indirectly, any individual patient, resident or client in any report of such research, audit or evaluation, or otherwise

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disclose patient, resident or client identities in any manner. Therefore, we conclude that there is no prohibition under the provisions of Section 630.140.3(4), RSMo 1986, to prevent disclosures of patient death records to the Office of the State Auditor, save the limitations discussed in the "Performance Audit" section of this opinion.

As a result, we conclude that the Office of the State Auditor is entitled to receive access to patient death records to the extent that such records relate to the duty of the State Auditor to postaudit the financial condition of the Department and its facilities. Blanket assertions of "potential litigation" will not suffice to prevent disclosure of patient death records to the Office of the State Auditor. See State ex rel. Friedman v. Provaznik, 668 S.W.2d 76, 80 (Mo. banc 1984). However, the patient death records provided by the Department to the State Auditor shall not be divulged by the State Auditor in such a way to reveal personally identifiable information.

#### Abuse and Neglect Investigation Reports

Another issue raised in the opinion requests is whether or not the Office of the State Auditor is entitled to receive access to abuse and neglect investigation reports.

As was previously indicated, Section 630.080, RSMo 1986, provides in part that the State Auditor shall have access to all records. The words "any" and "all" have been described as the most comprehensive words in the English language. North v. Hawkinson, 324 S.W.2d 733, 744 (Mo. 1959). The word "shall" is generally construed as mandatory and not permissive. State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 54 (Mo.App. 1957). As a result, unless the Office of the State Auditor is entitled to receive access to abuse and neglect investigation reports, the State Auditor shall not have access to all records. Likewise, unless the State Auditor shall have access to the abuse and neglect investigation reports, there is a limitation upon the authority of the State Auditor. In other words, such a construction would repeal by implication that the State Auditor shall have access to all records. Similarly, such a construction would repeal by implication the authority of the State Auditor under Section 29.130, RSMo 1986, to have free access to all of the offices of the state for the inspection of such books, accounts and papers as concern any of her duties. The law does not favor repeal by implication; and where there are two or more provisions relating to the same subject matter, they must, if reasonably possible, be construed so as to maintain the integrity of both. Gross v. Merchants-Produce Bank, 390 S.W.2d 591, 598 (Mo.App. 1965). Therefore, we conclude that the

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Office of the State Auditor is entitled to receive access to the abuse and neglect investigation reports under the provisions of Section 630.080, RSMo 1986, to the extent that such records relate to the duty of the State Auditor to postaudit the financial condition of the Department and its facilities as discussed in the "Performance Audit" section of this opinion.

Physician Peer Review Minutes or Records

Another issue that has been raised in the opinion requests is whether or not the Office of the State Auditor is entitled to access to physician peer review minutes or records where review of patient care was the subject of the meeting. The statutory provisions relating to the peer review process are found in Chapter 537, RSMo 1986. Section 537.035, RSMo 1986, refers to the activities of peer review committees. In this regard, a peer review committee is defined in Section 537.035.1(2), RSMo 1986, as follows:

(2) "Peer review committee", a committee of health care professionals with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services or to exercise any combination of such responsibilities.

Section 537.035.4, RSMo 1986, relating to the proceedings of a peer review committee provides as follows:

4. Except as otherwise provided in this section, the proceedings, findings, deliberations, reports, and minutes of peer review committees concerning the health care provided any patient are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person or entity or be admissible into evidence in any judicial or administrative action for failure to provide appropriate care. Except as otherwise provided in this section, no person who was in attendance at any peer review committee proceeding shall be permitted or required to disclose any information acquired in connection with or in the course of such proceeding, or to disclose any opinion, recommendation, or evaluation of the committee or board, or any member thereof; provided, however, that

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information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because it was presented during proceedings before a peer review committee nor is a member, employee, or agent of such committee, or other person appearing before it, to be prevented from testifying as to matters within his personal knowledge and in accordance with the other provisions of this section, but such witness cannot be questioned about testimony or other proceedings before any health care review committee or board or about opinions formed as a result of such committee hearings.

In State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804 (Mo. banc 1984), the Missouri Supreme Court determined, among other matters, that no peer review privilege existed under Missouri law for factual statements. Following Chandra, the General Assembly of Missouri amended Section 537.035.4 to provide as set forth above. Thereafter, in State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852 (Mo. banc 1986), a hospital brought an original action in prohibition seeking to prohibit the trial judge from allowing plaintiffs in a malpractice action, among other matters, to discover peer review committee documents. The plaintiffs had requested the relator to produce peer review committee reports relating to the performance of one of the defendant physicians, not only for the surgery in which the alleged malpractice was committed, but also with respect to other patients from 1980 until the date of the complained of surgery. The plaintiffs' request sought peer review committee reports concerning the health care provided to a patient. The Missouri Supreme Court held that the information the plaintiffs desired fell squarely within the exemption from discovery created by the General Assembly in Section 537.035.4, RSMo 1986. The Court pointed out that this statutory provision expressed the public policy of the state that peer review committee proceedings, to the extent that they address the health care provided any patient, were immune from discovery. As a result, the Court concluded that prohibition was appropriate in that case to the extent that discovery was circumscribed by Section 537.035.4, RSMo 1986.

After due consideration, we conclude that, subject to the limitations set forth in the section of this opinion entitled "Performance Audit," the State Auditor is entitled to receive access to physician peer review minutes or records where review

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of patient care was the subject of the meeting. In this connection, it is our view that the decision of the Supreme Court in the case of State ex rel. Faith Hospital v. Enright, supra, held only that peer review committee proceedings, to the extent that they address the health care provided any patient, were immune from discovery in a private action. However, the decision by the Missouri Supreme Court in the Enright case was in no way based upon any holding that records declared to be confidential by Section 537.035.4, RSMo 1986, could not be inspected by the State Auditor in order to conduct a postaudit of the Department of Mental Health and its facilities. In addition, the cardinal rule of statutory construction is to ascertain the intention of the lawmaking body and as far as possible to give effect to the intention expressed. Household Finance Corporation v. Robertson, 364 S.W.2d 595, 602 (Mo. banc 1963). In reviewing the confidentiality provisions of Section 537.035.4, RSMo 1986, it is apparent that the intent of the Legislature is to protect the privacy of patients and physicians concerning the health care provided a patient. This legislative intent is not abrogated by allowing the State Auditor access to physician peer review minutes or records where review of patient care was the subject of the meeting. Section 29.070, RSMo 1986, provides in part that every examiner appointed by the State Auditor shall, before entering upon the duties of his appointment, take and file in the Office of the Secretary of State an oath which, among other matters, indicates that he will not reveal the condition of any office examined by him or any information secured in the course of any examination of any office to anyone except the State Auditor. Section 29.080, RSMo 1986, provides in part that for any violation of this oath of office or of any duty imposed upon him by Chapter 29, any examiner shall be guilty of a felony. Also, in Attorney General Opinion No. 209, Lehr, 1975, a copy of which is enclosed, it was held in part that raw files, work papers, and other documents and meetings held preparatory to the issuance of signed audit reports of the State Auditor shall not be open to the public. Lastly, as has been previously suggested, under the provisions of Section 630.080, RSMo 1986, any physician peer review minutes or records where review of patient care was a subject of the meeting provided by the Department to the State Auditor shall not be divulged by the State Auditor in such a way to reveal personally identifiable information. As a result, if the State Auditor is allowed access to the physician peer review minutes or records where review of patient care was the subject of the meeting, all the applicable statutes are given effect. The State Auditor is allowed to exercise her statutory authority and the privacy of the individuals covered by the provisions of Section 537.035.4, RSMo 1986, is protected and the legislative intent is accomplished.

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In summary, it is our conclusion that, to the extent that such records relate to the duty of the State Auditor to postaudit the financial condition of the Department and its facilities, the Office of the State Auditor is entitled to access to physician peer review minutes or records where review of patient care was the subject of the meeting. However, the physician peer review minutes or records shall not be divulged by the State Auditor in such a way to reveal personally identifiable information.

Records Relating to Litigation Against the Department

In her opinion request, one of the issues posed by State Auditor Kelly is whether or not the State Auditor is entitled to receive access to records relating to litigation pending against the Department of Mental Health and its facilities. In his opinion request, Dr. Schafer raises the issue as to whether or not the State Auditor has a right of access to information which is protected by the attorney-client privilege or work product privilege because the matter is in litigation, or to information which, if disclosed to the public, would compromise the litigation strategy of the state. In considering the foregoing issues, we are not precisely aware of the documents involved in the dispute or the nature of the factual circumstances surrounding any alleged attorney-client or work product privileges. Therefore, we cannot specifically answer the questions that have been presented. However, for the convenience of the parties, we will state generally our views.

We believe that the attorney-client privilege and the work product privilege are as applicable to departments, agencies, institutions, officers, and employees of state government as to any other party litigants. These privileges facilitate equitable litigation, and the Department of Mental Health is fully entitled to the protections thereby afforded. Therefore, in situations wherein the attorney-client privilege or the work product privilege is properly assertable in pending or imminent litigation, we believe the State Auditor is not entitled to access to litigation records when the Department properly asserts either privilege -- the reason being, in part, that if disclosure of otherwise privileged records is afforded to the State Auditor, the Department's attorney-client privilege or work product privilege may be deemed as waived during subsequent litigation proceedings. In addition, if the Department were to disclose information to the State Auditor in pending or imminent litigation where the attorney-client privilege or work product privilege were properly assertable, this could result in adversarial attempts to obtain that information from the Office of the State Auditor.

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On the other hand, the parties' attention is directed to the case of State ex rel. Great American Insurance Co. v. Smith, 574 S.W.2d 379 (Mo. banc 1978). In the extensive discussion involving the doctrine of attorney-client privilege, and other matters, the Missouri Supreme Court pointed out that only the actual attorney-client communications are privileged. The Court indicated that this does not mean that discoverable, factual information can be made privileged by mere recital between an attorney and client during confidential communications. The Department should assert the attorney-client privilege or the work product privilege only in those situations in which the privilege is properly applicable, and such assertion should not be relied upon in inappropriate circumstances to defeat the access of the Office of the State Auditor to litigation records to which it is clearly entitled.

Finally, the State Auditor's access to litigation records is limited not only by the limitations discussed in the "Performance Audit" section of this opinion but also to those records actually in the possession of the Department. Any records relating to pending or imminent litigation against the Department, which are provided by the Department to the State Auditor, shall not be divulged by the State Auditor in such a way to reveal personally identifiable information, and the Office of the State Auditor is reminded of the confidentiality provisions of Sections 29.070 and 29.080, RSMo 1986.

#### Conclusion

It is the opinion of this office that:

1. The State Auditor is not permitted to conduct performance audits of the Department of Mental Health and its facilities, but may postaudit the financial condition of the Department at its facilities.

2. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to the following records of the Department of Mental Health in its audit examination of the Department and its facilities:

A. Patient medical records, except drug and alcohol abuse records subject to federal confidentiality regulations;

B. Physician peer review minutes or records where review of patient care was the subject of the meeting;

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- C. Abuse and neglect investigation reports;
- D. Records of patient death cases.

3. To the extent that records relate to the duty of the State Auditor to postaudit the financial condition of the Department of Mental Health and its facilities, the Office of the State Auditor is entitled under the provisions of Section 630.080, RSMo 1986, to receive access to records relating to litigation pending against the Department of Mental Health in its audit examination of the Department and its facilities. However, where the doctrine of attorney-client privilege or work product privilege is properly assertable in pending or imminent litigation, the State Auditor is not entitled to access to those records.

4. Any of the foregoing records provided by the Department of Mental Health and its facilities to the State Auditor shall not be divulged by the State Auditor in such a way to reveal personally identifiable information, and the Office of the State Auditor is reminded of the confidentiality provisions of Sections 29.070 and 29.080, RSMo 1986.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Opinion No. 209, Lehr, 1975  
Opinion No. 117, Keyes, 1977

ARREST: A municipal police officer responding to  
CITY POLICE: an emergency situation outside the  
POLICE: limits of the municipality pursuant to  
Section 70.820, RSMo 1986 does have  
arrest powers for violations of state law, but does not have  
arrest powers for violations of municipal ordinances.

July 31, 1987

OPINION NO. 78-87

David C. Dally  
Jasper County Prosecuting Attorney  
Jasper County Courthouse  
Carthage, Missouri 64836

FILED  
78

Dear Mr. Dally:

This opinion is in response to your question asking:

Provided that a municipality has enacted the necessary ordinance required by Section 70.820, RSMo 1986, once a municipal police officer responds to an emergency situation outside the boundaries of the municipality, does that officer have arrest power for violations of state law and/or violations of municipal ordinances?

Section 70.820, RSMo 1986 provides:

70.820. Authority of peace officers to respond to emergencies outside jurisdiction, emergency situation defined. --1. Any peace officer of a county or a peace officer of any political subdivision who has completed the basic police training program as promulgated by chapter 590, RSMo, shall have the authority to respond to an emergency situation outside the boundaries of the political subdivision from which he derives his authority.

2. Before a municipal police officer shall have the authority to respond to an emergency situation outside the boundaries of the municipality from which the officer derives his authority pursuant to subsection 1 of this section, the authority shall be first authorized by ordinance by the governing body of the municipality.

3. As used in this section, "emergency situation" means any unforeseen combination of circumstances or events involving danger or imminent danger to human life or property which requires immediate action.

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Section 70.820 authorizes "[a]ny peace officer of a county or a peace officer of any political subdivision who has completed the basic police training program as promulgated by chapter 590, RSMo, [to] have the authority to respond to an emergency situation outside the boundaries of the political subdivision from which he derives his authority." Section 70.820 goes on to require that a municipal police officer must first be authorized to respond to emergency situations outside the boundaries of the municipality by ordinance of the governing body of said municipality. The section also defines "emergency situation" for purposes of the statute.

Section 70.815, RSMo 1986, authorizes contracts between political subdivisions for the provision of police services by one to the other. Such section provides:

70.815. Political subdivisions may provide police service for other political subdivisions--powers of arrest and immunity--definitions. --1. As used in this section:

(1) "Governing body" means the board, body, council, or persons in which the powers of a political subdivision as a body corporate, or otherwise, are vested;

(2) "Political subdivision" means any agency or unit of this state empowered by law to maintain a law enforcement agency.

2. The governing body of any political subdivision may by ordinance, order or other ruling enter into a contract or agreement with any other political subdivision for the provision of police services by one political subdivision to another on request. The scope of the agreement may be general or specific, and may or may not provide for compensation for such services. Officers providing police services in another jurisdiction pursuant to such an agreement shall have the same powers of arrest as officers of the requesting political subdivision, and shall have the same immunity as if acting within their own jurisdiction.

Section 544.216, RSMo 1986, outlines the powers of arrest. Such section provides:

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544.216. Powers of arrest--arrest without warrant, on suspicion persons violating any law of state including misdemeanors and ordinances, exception. --Any sheriff or deputy sheriff, any member of the Missouri state highway patrol, and any county or municipal law enforcement officer in this state, except those officers of a political subdivision or municipality having a population of less than two thousand persons or which does not have at least four full-time nonelected police officers unless such subdivision or municipality has elected to come under and is operating under the provisions of sections 590.100 to 590.150, RSMo, may arrest on view, and without a warrant, any person he sees violating or who he has reasonable grounds to believe has violated any law of this state, including a misdemeanor, or has violated any ordinance over which such officer has jurisdiction. The power of arrest authorized by this section is in addition to all other powers conferred upon law enforcement officers, and shall not be construed so as to limit or restrict any other power of a law enforcement officer.

In interpreting Section 70.820, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect wherever possible. State ex rel. D. M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984).

On its face, Section 70.820 does not purport to grant any municipal police officer any broader powers of arrest than those provided for in Section 544.216. While Section 544.216 provides that a municipal law enforcement officer may arrest when he/she has seen a violation of state law or when he/she "has reasonable grounds to believe" there has been a violation of state law, Section 544.216 only authorizes a municipal law enforcement officer to arrest for a violation of a municipal ordinance where said violation occurred within that officer's jurisdiction. Rustici v. Weidemeyer, 673 S.W.2d 762 (Mo. banc 1984). Thus a municipal police officer may arrest for violations of state law when responding to an emergency situation outside the limits of the municipality pursuant to Section 70.820, but may not arrest for violations of municipal ordinances. (This conclusion assumes that the municipality has enacted the ordinance required by Section 70.820 and that the municipal police officers have

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completed the basic police training program promulgated by Chapter 590, RSMo.)

A municipal police officer could arrest for violations or suspected violations of a municipal ordinance in another jurisdiction if the governing bodies of both political subdivisions have entered into a contract or agreement as described in Section 70.815. That section does specifically provide that "[o]fficers providing police services in another jurisdiction pursuant to such an agreement shall have the same powers of arrest as officers of the requesting political subdivision, and shall have the same immunity as if acting within their own jurisdiction." In instances of responding to an emergency situation where the governing bodies of both political subdivisions have entered into such a contract or agreement, the municipal police officers could arrest not only for violations of state law, but also for violations of municipal ordinances of the municipality in which the emergency situation occurs.

#### CONCLUSION

It is the opinion of this office that a municipal police officer responding to an emergency situation outside the limits of the municipality pursuant to Section 70.820, RSMo 1986 does have arrest powers for violations of state law, but does not have arrest powers for violations of municipal ordinances.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

CIRCUIT COURT DRAINAGE DISTRICT:  
CONFLICT OF INTEREST:  
DRAINAGE DISTRICT:  
INCOMPATIBILITY OF OFFICES:  
A member of the Board of  
Supervisors of a drainage  
district organized under  
Chapter 242, RSMO, may not  
accept pay for work such as  
contract mowing, brush clearing or other similar services.

September 4, 1987

OPINION NO. 86-87

The Honorable W. O. "Bob" Howard  
Representative, District 16  
Route 2, Box 184  
Elsberry, Missouri 63343

FILED  
86

Dear Representative Howard:

This opinion is in response to your question asking:

Can a member of a drainage district accept  
pay for work in the district such as  
contract mowing, brush clearing or any  
other service which the drainage board  
would contract for? If not, are there any  
penalties for infraction of the law?

The drainage district in question was organized under  
Chapter 242, RSMo. By the term "member" you refer to a member  
of the Board of Supervisors provided for in Sections 242.150  
through 242.190, RSMo 1986.

Section 105.458.1, RSMo 1986, relating to the regulation of  
conflict of interest, provides:

105.458. Prohibited acts by members  
of governing bodies of political subdivi-  
sions, exceptions. -- 1. No member of any  
legislative or governing body of any  
political subdivision of the state shall:

(1) Perform any service for such  
political subdivision or any agency of the  
political subdivision for any consideration  
other than the compensation provided for  
the performance of his official duties; or

\* \* \*

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A drainage district organized under Chapter 242, RSMo, is a political subdivision of the state. See Bohannon v. Camden Bend Drainage Dist., 208 S.W.2d 794 (Mo.App. 1948). The Board of Supervisors is the governing body of the district. Thus, Section 105.458 applies to a member of the Board of Supervisors of a drainage district organized under Chapter 242, RSMo.

This statutory provision is consistent with the common law holding that the employment of an individual by a public body of which he is a member is void as against public policy. See Missouri Attorney General Opinion No. 287, Brandom, 1969; Missouri Attorney General Opinion No. 149, Argenbright, 1967; and Missouri Attorney General Opinion No. 465, Norbury, 1966, copies of which are enclosed.

However, Section 242.200.4, RSMo 1986, specifically provides:

242.200. Board to elect president  
and secretary -- report -- compensation.

\* \* \*

4. At the annual meeting held under the provisions of section 242.160, the compensation to be received by the members of the board for their services while actually engaged in work for the district shall be determined.

The issue presented is whether Section 242.200.4 permits the conduct about which you are concerned even though such conduct appears prohibited by Section 105.458.1 and the common law.

The canon of statutory construction governing such situation requires that two seemingly incompatible enactments be construed together so that, when possible, both are given effect. State ex rel. Ashcroft v. City of Fulton, 642 S.W.2d 617, 620 (Mo. banc 1982). In addition, statutes providing compensation for an officer must be strictly construed against the officer. State ex rel. Smith v. Atterbury, 270 S.W.2d 399 (Mo. banc 1954).

Based on these rules of statutory construction, we conclude Section 242.200.4 refers to compensation for the official duties of the board member such as attendance at meetings. Section 105.458.1 and the common law prohibit the board member from accepting pay for work such as contract mowing, brush clearing or other similar services.

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With respect to the question concerning penalties, Section 105.478, RSMo 1986, provides:

105.478. Penalty. -- Any person guilty of purposefully violating any of the provisions of sections 105.452 to 105.464 is guilty of a felony and, upon conviction, shall be punished by imprisonment by the department of corrections and human resources for a term not exceeding five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. On and after January 1, 1979, a violation of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482 shall be considered a class D felony and, upon conviction, shall be punished as provided by law.

Subsection 2 of Section 105.472, RSMo 1986, sets forth the procedure for filing a complaint against an official of a political subdivision concerning a violation of Section 105.458. Such subsection provides:

105.472. Complaints, how made, contents. --

\* \* \*

2. All complaints against officials or employees of a political subdivision of the state concerning violations of the provisions of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482 shall be made to the prosecuting attorney or circuit attorney of the appropriate political subdivision in writing. The complaints shall name the person allegedly violating the provisions of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482, the nature of the violation and the date of the commission of the violation and shall be signed by the complainant and shall contain the complainant's statement under oath that he believes, to the best of his knowledge, the truthfulness of the statements contained therein.

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CONCLUSION

It is the opinion of this office that a member of the Board of Supervisors of a drainage district organized under Chapter 242, RSMo, may not accept pay for work such as contract mowing, brush clearing or other similar services.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 287, Brandom, 1969  
Opinion No. 149, Argenbright, 1967  
Opinion No. 465, Norbury, 1966

COUNTY SHELTERED WORKSHOPS: Transportation sales tax  
DEVELOPMENTAL DISABILITIES PROGRAM: monies distributed under  
TAXATION -- SALES TAX: Section 94.645.5, RSMo  
1986, and which are expended to the boards of directors established in the City of St. Louis and in St. Louis County under Section 205.970, RSMo 1986, must be used to pay the transportation costs of those clients designated in subsection 5 of Section 94.645, RSMo 1986, regardless of whether those clients reside in the City of St. Louis or in St. Louis County.

May 12, 1987

OPINION NO. 89-87

The Honorable Edwin L. Dirck  
Senator, District 24  
State Capitol Building, Room 221  
Jefferson City, Missouri 65101

FILED  
89

Dear Senator Dirck:

This opinion is in response to your question asking:

May a board of directors established under Section 205.970, RSMo 1986, to whom is expended transportation sales tax monies pursuant to subsection 5 of Section 94.645, RSMo 1986, restrict the use of those monies to pay transportation costs only for those developmentally disabled individuals attending the regional center who are residents of the county or the city which appointed the board of directors? For example, can the board of directors appointed by the City of St. Louis refuse to spend any of this money on transportation costs for those individuals who attend the regional center but who are residents of St. Louis County?

Sections 94.600 to 94.655, RSMo 1986, provide that Kansas City, the City of St. Louis, and St. Louis County may impose a sales tax for purposes enumerated in those statutes. Section 94.645 provides for the allowable uses of these monies once received by the local jurisdiction. Subsection 5 of that section provides:

5. Any provisions of sections 94.600 to 94.655 to the contrary notwithstanding,

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not less than two percent of the proceeds of any sales tax imposed by any city not within a county and any county of the first class having a charter form of government and not containing any part of a city with a population of at least three hundred thousand inhabitants under sections 94.600 to 94.655 that are appropriated and paid by a city or county to an interstate transportation authority shall be expended to sheltered workshop or residence facility, boards of directors established pursuant to section 205.970, RSMO, to pay costs of transportation, above the level of expenditures for such costs during the fiscal year of the board immediately preceding January 1, 1984, to and from sheltered or presheltered employment of developmentally disabled clients of the regional center for the developmentally disabled serving the area where the tax is imposed, and shall be expended only for the purpose of transporting persons who are developmentally disabled and require nonpublic transportation and who are residents of the city not within a county, or of the adjacent county of the first class having a charter form of government and which does not contain any part of a city with a population of at least three hundred fifty thousand inhabitants. As used in this subsection, "developmentally disabled clients" means persons served by the regional center who have a developmental disability as defined in section 630.005, RSMO.

(Emphasis added.)

The City of St. Louis and St. Louis County are the only jurisdictions which meet the classifications of taxing authorities in subsection 5. There is only one regional center for the developmentally disabled which serves the area which includes as a part thereof the City of St. Louis and St. Louis County. Section 205.970, RSMO 1986, provides for the establishment of the board of directors referred to in subsection 5 of Section 94.645. The governing authority of any county or the City of St. Louis may appoint a board of directors. The City of St. Louis and St. Louis County both have

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such boards. The boards govern sheltered workshops, residence facilities, or related services, or any combination of such for the care or employment, or both, of handicapped persons. Section 205.968.1, RSMo 1986.

Subsection 5 sets forth four factors to determine whose transportation costs must be paid by the boards of directors: (1) the person transported must be a developmentally disabled client of the regional center for the developmentally disabled which services the area where the tax is imposed; (2) the transportation must be to or from that client's sheltered or presheltered employment; (3) the client must require non-public transportation; and (4) the client must reside in the City of St. Louis or in St. Louis County. The wording of subsection 5 is such that a board of directors, regardless of whether it is in the City or in St. Louis County, must use the tax money to pay the transportation costs of persons meeting those four requirements. The statute contains no provision prohibiting the city or the county board paying the transportation costs of clients who reside in the other jurisdiction. The description of those to benefit from the tax revenues, which description is provided at the end of the first sentence of subsection 5, is set forth as applying to revenues from the transportation "sales tax imposed by any city not within a county and any county of the first class [St. Louis County] . . . ." [emphasis added]. Therefore, the disjunctive setting forth the fourth factor ("who are residents of the city not within a county, or of the adjacent county of the first class [St. Louis County] . . . .") means that both the city and the county boards must pay transportation costs regardless of whether the client is a resident of the City or of St. Louis County.

The fact that these boards of directors usually confine their activities to those clients residing in their respective jurisdictions was taken into account by the legislature. In the year after the legislature amended Section 94.645 to add subsection 5, the legislature amended subsection 7 of Section 205.970 to add the following underlined provision:

7. The board may accept any gift or property or money for the use and benefit of the facility, and the board is authorized to sell or exchange any such property which it believes would be to the benefit of the facility so long as the proceeds are used exclusively for facility purposes. The board shall have exclusive control of all gifts, property or money it may accept; of all interest or other proceeds which may

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accrue from the investment of such gifts or money or from the sale of such property; of all tax revenues collected by the county on behalf of the facilities or services; and of all other funds granted, appropriated, or loaned to it by the federal government, the state, or its political subdivisions so long as these resources are used solely to benefit the facility or related services except those paid for transportation purposes under the provisions of section 94.645. Laws of Missouri, 1984, pp. 512 to 513.

(Emphasis added.)

When the legislature provided in subsection 7 that a board of directors would have exclusive control over the money and property which it might receive "so long as these resources are used solely to benefit the facility or related services," it then specifically exempted from this restriction the monies that a board of directors might receive to pay for the cost of transportation under Section 94.645. How those monies are used is controlled by subsection 5 of Section 94.645. Those monies, according to subsection 5, are to benefit those clients residing in either the City of St. Louis or St. Louis County and their use cannot be restricted according to the client's place of residence except insofar as the client must be from either the city or the county and that the jurisdiction in which they reside be one which has imposed the transportation sales tax. As an example, the board of directors in the City of St. Louis cannot restrict these sales tax revenues to the paying of the cost of transportation only for those clients who reside in the City of St. Louis.

The legislature made no provision for a formula or mechanism to decide when the monies expended to one of the boards be used to pay for transportation costs of a client residing in the jurisdiction of the other board. Apparently this was to be left to the two boards of directors to decide through good faith negotiations between the boards to carry out the statutory objective of using the sales tax monies to benefit the developmentally disabled clients in St. Louis City and St. Louis County regardless of which of the two jurisdictions they reside in.

The Honorable Edwin L. Dirck

CONCLUSION

Therefore, it is the opinion of this office that transportation sales tax monies distributed under Section 94.645.5, RSMo 1986, and which are expended to the boards of directors established in the City of St. Louis and in St. Louis County under Section 205.970, RSMo 1986, must be used to pay the transportation costs of those clients designated in subsection 5 of Section 94.645, RSMo 1986, regardless of whether those clients reside in the City of St. Louis or in St. Louis County.

Very truly yours,

*William L. Webster*

WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

June 4, 1987

OPINION LETTER NO. 90-87

The Honorable Edwin L. Dirck  
Senator, District 24  
State Capitol Building, Room 221  
Jefferson City, Missouri 65101

Dear Senator Dirck:

FILED  
90

This opinion letter is in response to your question asking:

Does Section 89.020.2, RSMo 1986,  
relating to the inclusion of group homes in  
the classification of single family dwelling  
or residence, apply to the unincorporated  
area of St. Louis County?

We understand your question refers to private care providers  
who are licensed by and contract with the Missouri Department  
of Mental Health to provide group homes.

Section 89.020.2, RSMo 1986, provides:

For the purpose of any zoning law,  
ordinance or code, the classification single  
family dwelling, or residence shall include  
any home in which eight or fewer unrelated  
mentally retarded or physically handicapped  
persons reside, and may include two  
additional persons acting as house parents  
or guardians who need not be related to each  
other or to any of the mentally retarded or  
physically handicapped persons residing in  
the home. In the case of any such  
residential home for mentally retarded or  
physically handicapped persons, the local  
zoning authority may require that the

The Honorable Edwin L. Dirck

exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in any specific single family dwelling neighborhood.

St. Louis County is a first class county operating under a home rule charter pursuant to Article VI, Section 18 of the Missouri Constitution. Article VI, Section 18(c) states:

The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county may contract with any municipality or political subdivision in the county and perform any of the services and functions of any such municipality or political subdivision.

The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivisions, except school districts, throughout the entire county within as well as outside incorporated municipalities; any such charter provisions shall set forth the limits within which the municipalities may exercise the same power collaterally and coextensively. When such a proposition is submitted to the voters of the county the ballot shall contain a clear definition of the power, function or service to be performed and the method by which it will be financed.

St. Louis County derives the legislative power to adopt zoning ordinances from Article VI, Section 18(c) of the Missouri Constitution. Because this power is derived from the Missouri Constitution and not from any statutory grant of power, the courts of this state have held that zoning ordinances of St. Louis County take precedence over statutory

The Honorable Edwin L. Dirck

zoning provisions. See, Treme v. St. Louis County, 609 S.W.2d 706 (Mo.App. 1980); Williams v. White, 485 S.W.2d 622 (Mo.App. 1972).

Therefore, it is the opinion of this office that Section 89.020, RSMo 1986, does not apply to St. Louis County where there is a St. Louis<sup>1</sup> County ordinance in conflict with Section 89.020.2, RSMo 1986.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

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<sup>1</sup>Because of the conclusion reached, we do not address whether Section 89.020, RSMo 1986, applies to counties. Section 89.010, RSMo 1986, states the provisions of Sections 89.010 to 89.140, RSMo, apply to all cities, towns and villages in this state. Subsection 4 of Section 89.020, RSMo 1986, however, specifically refers to "county, city, town or village."



## ATTORNEY GENERAL OF MISSOURI

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P. O. Box 899  
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May 12, 1987

OPINION LETTER NO. 91-87

The Honorable Robert L. Dunning  
Representative, District 119  
State Capitol Building, Room 411  
Jefferson City, Missouri 65101

FILED  
91

Dear Representative Dunning:

This opinion letter is in response to your question asking whether an increase in the price of grave lots in Englewood Cemetery, Clinton, Missouri, would violate the Hancock Amendment unless such increase in the price of grave lots was approved by the voters of the city of Clinton. You have advised us that the Englewood Cemetery is owned by the city of Clinton.

The answer to your question depends upon whether the charges for grave lots in a city-owned cemetery constitute taxes, licenses, or fees within the meaning of Article X, Section 22(a) of the Missouri Constitution, which section was adopted as part of what is commonly referred to as the Hancock Amendment. If such charges are not taxes, licenses, or fees, but rather are contractual in nature, they would not be subject to such a vote. Article X, Section 22(a) of the Missouri Constitution provides in part:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

The Honorable Robert L. Dunning

We have previously stated that we are of the view there is a reasonable probability a court would hold that water district rates are of a contractual nature and, therefore, that the Hancock Amendment does not apply. See Opinion Letter No. 76-85, a copy of which is enclosed. We have also stated that increases in hospital room rates and other hospital charges are contractual in nature and do not require voter approval. See Opinion No. 122, Leffler, 1982, a copy of which is also enclosed. All charges which a city or other political subdivision collect are not mandated by law. The city or political subdivision may contract with individuals, corporations, and other political subdivisions to provide services and charge the recipient for those services. Providing a grave lot in a cemetery owned by a city is one of those types of services that is contractual in nature. The decision to increase the price of grave lots in a cemetery owned by a city does not come within the purview of the Hancock Amendment. See, also, Pace v. City of Hannibal, 680 S.W.2d 944 (Mo. banc 1984).

Therefore, it is the opinion of this office that an increase in the price of grave lots in Englewood Cemetery, Clinton, Missouri, is not subject to the Hancock Amendment.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Opinion No. 122, Leffler, 1982  
Opinion Letter No. 76-85



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
(314) 751-3321

June 16, 1987

OPINION LETTER NO. 99-87

Mr. Charles G. Ankrom  
Polk County Prosecuting Attorney  
Polk County Courthouse  
Bolivar, Missouri 65613

FILED  
99

Dear Mr. Ankrom:

This opinion letter is in response to your question asking:

Polk County, a third-class county, has not had an elected county surveyor for several years. Recently, a local surveyor has indicated his desire to run for that position in 1988. Are we, under Section 60.010, RSMo, required to have an elected county surveyor?

Sections 60.010 through 60.100, RSMo 1986, set forth the statutory provisions establishing the office of county surveyor in second, third and fourth class counties. Section 60.010 provides for the election of a county surveyor every four years. The rest of the sections make provisions as to the oath of office, official bond, transfer of official papers at the expiration of the county surveyor's term or upon his death, appointment of deputies and the surveyor's charge for services. For the purposes of your question, Section 60.010 is the focus of our attention. Section 60.010 provides:

60.010. Surveyor to be elected in certain counties -- qualifications -- term. --At the regular general election in the year 1948, and every four years thereafter, the voters of each county of this state in classes two, three and four shall elect a registered land surveyor as county surveyor, who shall hold his office for four years and

Mr. Charles G. Ankrom

until his successor is duly elected, commissioned and qualified. The person elected shall be commissioned by the governor.

When interpreting a statute, the intention of the legislature must be determined from the plain and ordinary meaning of the words used as well as considering the statute as a whole including its object and the consequences that would result from construing it one way or the other. State ex rel. Hay v. Flynn, 235 Mo.App. 1003, 147 S.W.2d 210, 211 (St.L. Ct.App. 1941). Although not a universal rule, courts normally construe the word "shall" as having a mandatory meaning. State ex rel. Dreer v. Public School Retirement System, 519 S.W.2d 290, 296 (Mo. 1975).

The mandatory meaning would best reflect the intention behind the legislature's use of the word "shall" in Section 60.010 and would also be consistent with the conclusion this office reached in Opinion No. 48, Kesterson, March 18, 1943 (copy enclosed) in which this office opined that counties were under a mandatory duty to establish a county highway commission pursuant to Sections 8502 through 8513, RSMo 1939.

If the County Highway Commission Act should be considered as directory, then the various County Courts of the State by not following its provisions could nullify the Act. Another statutory construction which might be applicable here is that the Legislature should not be held to have enacted a meaningless statute. After considering this entire Act we are convinced that the lawmakers have intended that it be mandatory and that its provisions be carried out by the various County Courts. Id. at page 3.

This conclusion is consistent with the fact that the provisions of the Comprehensive Election Act of 1977, which govern the election of county officials, provide that the county has a duty to put a candidate on the ballot as long as he complies with the statutory requirements of becoming a candidate. See, for instance, Section 115.321.5, RSMo 1986 ("The name of each person who files a valid petition for nomination as an independent candidate shall be placed on the official ballot as an independent candidate for the office at the next general election or the special election if the petition nominates a candidate to fill a vacancy which is to be filled at a special election...."); Section 115.333.1, RSMo 1986 ("When any petition [for the formation of a new party or

Mr. Charles G. Ankrom

for the nomination of an independent candidate] is filed with the secretary of state or an election authority under the provisions of this subchapter, the secretary of state or the election authority shall determine whether or not it complies with the provisions of this subchapter...."); Section 115.343, RSMo 1986 ("The name of such candidate [winner of party primary] shall be placed on the official ballot at the general election unless he is removed or replaced as provided by law....").

For the county to refuse to hold an election for county surveyor would be tantamount to abolishing the office. This would be contrary to the common law principles applicable to the abolishment of a local elective office.

In the absence of constitutional restriction, an office created by the legislature can be abolished by it. So, the governmental authority which possesses the power to create an office has the implied power to abolish such office, or to consolidate two or more offices which it has created....

Where permitted by the constitution, a legislative body may delegate its authority to abolish the position of a civil officer, but this may be done only by an express authorization. It has been held that, where a higher legislative authority, in authorizing a subsidiary authority to create an office, has itself formulated the duties, the manner of election, and the term of office, the subsidiary authority, after creating the office, cannot thereafter abolish it during the term of the incumbent who has been elected to fill it; but there is also authority holding that the subsidiary authority has authority to abolish the office which has been thus created by it.

The intention of the legislature to abolish an office must be clearly stated. While it has been said that an office may be abolished by implication by the creation of a new office and the devolution on it of duties of the old office, reorganization of an existing system or department of

Mr. Charles G. Ankrom

government does not necessarily require abolition of prevailing offices. Since every public office is the creation of some law, it continues only so long as the law to which it owes its existence remains in force; hence, when such law is authoritatively abrogated the office ceases unless perpetuated by virtue of some other legal provision. [Footnotes omitted.] 67 C.J.S. Officers, Section 14, pp. 249-251.

(Emphasis added.)

There are no statutory or constitutional provisions giving the county the legal authority to abolish the office of county surveyor. Therefore, the county cannot refuse to hold an election simply because there has been no candidate to fill the office for the last several years.

When your question is examined in light of the mandatory language of Section 60.010 and of the Comprehensive Election Act of 1977 and in light of the fact that the county has no authority to in effect abolish the office of county surveyor, the conclusion must be that the county cannot refuse to have an election for county surveyor provided, of course, there is a candidate entitled to be placed on the ballot.

It is the opinion of this office that when there is a candidate who has fulfilled the legal requirements to have his name placed on a special, primary or general election ballot for the office of county surveyor, the election authority must place his name on the ballot and hold the election.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 48, Kesterson, March 18, 1943



## ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
(314) 751-3321

August 14, 1987

OPINION LETTER NO. 113-87

Paul S. McNeill, Jr.  
Director  
Department of Revenue  
Post Office Box 311  
Jefferson City, Missouri 65105

FILED  
113

Dear Mr. McNeill:

This opinion letter is in response to your question asking:

Does the Director of Revenue have the authority to select by competitive bid the depository bank for remittances from retailers of sales taxes where that bank holds such remittances between the time of receipt of such taxes by the Director, and the time those receipts are first identified and distributed between the State Treasurer (for State funds) and the Director's non-State accounts (for non-State funds)?

Retailers remit sales taxes to the Director of Revenue (hereinafter sometimes referred to as the "Director"). In the typical case, retailers tender a single check that includes payments for both state and local taxes, interest and penalties. The Director identifies the proper accounts for the remitted moneys and allocates the funds in accord with his findings.

At present, the Director credits each day's receipts to a "safekeeping" account and deposits the receipts in a bank. Overnight the State Computer System attempts to reconcile the sales tax returns and the receipts in order to determine what funds to credit to what account. On the day after receipt, the Director disposes of moneys in the safekeeping account in one of three ways. First, he tenders identified state moneys to the State Treasurer. Second, he tenders identified local

Paul S. McNeill, Jr.

moneys to the Director's appropriate local government account. Third, when he cannot determine how to divide a particular set of receipts, he credits the moneys to an "error-wrap" account.

Moneys may be credited to the error-wrap account for any of a variety of reasons. For example, the retailer may have miscomputed his taxes or aggregated taxes for two or more locations that have different tax rates. At such time as the Director can identify the proper recipient of moneys in the error-wrap account, he transfers money from that account to the Treasurer or to the appropriate local government account.

The powers of the Director and Treasurer are set forth in the Missouri Constitution and statutes. Accordingly, we must look to the Constitution and statutes of the State of Missouri to determine their respective powers.

In 1986, the people of the State of Missouri amended Article IV, Section 15 of the Missouri Constitution. The section now specifies that the Treasurer "shall be custodian of all state funds" and that the Director "shall take custody of and invest nonstate funds" (emphasis added). The section goes on to define the term "nonstate funds" as follows:

As used in this section, the term "nonstate funds" shall include all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as "nonstate funds" to be administered by the department of revenue.

The problem is what to do with the money the Director collects before he has determined whether the money is state funds or nonstate funds. The Director's safekeeping and error-wrap accounts contain a combination of state and nonstate funds. The Constitution does not mandate that either the Director or the Treasurer must hold the unidentified or commingled funds. However, the Director has been charged with the obligation to collect all taxes, whether the funds be state funds or nonstate funds. See Article IV, Section 22 of the Missouri Constitution and Section 136.010, RSMo 1986. The Director has the obligation to deliver all state funds to the Treasurer. The 1986 amendment to Article IV, Section 15 of the Constitution suggests that under some circumstances the

Paul S. McNeill, Jr.

Director will collect money and transmit it back to political subdivisions of the state. Because the Director has the obligation to deliver state and nonstate funds to the appropriate recipient and no one else has the obligation or authority to determine which funds are state funds and which funds are nonstate funds, it falls to the Director to determine to whom to deliver the funds.

In the normal case, the Director will be able to determine the proper recipient very promptly. But whether the determination takes five minutes (the time to open an envelope and read the contents) or five weeks (the time to query the taxpayer for more information), we can locate no provision of law that dictates what the Director should do with the money while working to identify the recipient.

Our office reviewed a similar question at length in Opinion No. 223, Owens, 1969, a copy of which is enclosed. Such opinion addressed the powers of the Director to hold and invest intangible tax revenues that would later be paid to local governments. We determined that the lawful custodian of public funds was an insurer who could take any action with the moneys not otherwise prohibited by law. Thus, it was lawful for the Director to deposit the funds for safekeeping and the funds so deposited could draw interest for the benefit of the eventual recipients.

Therefore, it is the opinion of this office that the Director of Revenue has the authority to select by competitive bid the depository bank for the remittances from retailers of sales taxes where that bank holds such remittances between the time of receipt by the Director and the time those receipts are first identified and distributed between the State Treasurer and the Director's non-State accounts.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Opinion No. 223, Owens, 1969



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 800  
(314) 751-3321

July 31, 1987

OPINION LETTER NO. 114-87

The Honorable Kenneth B. Jacob  
Representative, District 25  
State Capitol Building, Room 110-B  
Jefferson City, Missouri 65101

FILED  
114

Dear Representative Jacob:

This opinion letter is in response to your question asking:

Did the State Treasurer violate the Missouri Constitution or any other law by giving a total of \$15,000 as salary repositioning adjustments to twenty-nine employees in July, 1986?

You have provided to us the following information relating to your opinion request: In July, 1986, twenty-nine employees of the State Treasurer's office received a lump sum payment of \$500 each and two employees received \$250 payments. These payments, which totalled \$15,000, were made according to the State Treasurer's office as retroactive "salary repositioning adjustments" and to compensate employees for "special project tasks" performed previously on Saturday, June 21, 1986.

This office has reviewed copies of various documents provided to us by the State Treasurer's office. A copy of pages numbered 144 through 152 of the "Current Earnings Register" for the period ending June 30, 1986, for the State Treasurer's office (date of report July 13, 1986) shows salary payments to thirty-one employees in the total amount of \$15,000 before deductions. A copy of the "Payroll Requisition" for the State Treasurer's office for the pay period ended June 30, 1986, consisting of two pages (certification dated July 8, 1986) shows the thirty-one payments referred to above and shows under the remarks column beside each of the payments, "'86 repositioning." We are unaware of any additional documents prepared at or about the time of such payments that shed any additional light upon the purpose of the payments. We further

The Honorable Kenneth B. Jacob

understand that the State Treasurer's office had a sufficient amount in its personal services appropriation to make the payments in question. We have also reviewed State Auditor's Report No. 87-37 relating to the Office of State Treasurer for the year ended June 30, 1986.

Article III, Section 39 of the Missouri Constitution provides in part:

Section 39. Limitation of power of general assembly. The general assembly shall not have power:

\* \* \*

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

\* \* \*

The courts of this state have interpreted Article III, Section 39(3) to mean that the provision prohibits extra payment after services are rendered. See, State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975) (retirement benefits conferred upon judges retired from the service prior to the enactment of the Retirement Act of 1971 would constitute extra compensation after services were rendered); Jackson v. Wilson, 581 S.W.2d 39 (Mo.App. 1979) (retroactive application of the tort defense fund is extra compensation after service has been rendered); Vangilder v. City of Jackson, 492 S.W.2d 15 (Mo.App. 1973) (Article III, Section 39(3) pertains to extra compensation given after service has been performed, not to compensation earned during service but taken after the period of service).

In addition, this office has interpreted this constitutional provision in response to the question whether the State Board of Cosmetology could pay a bonus to office employees:

The Constitutional provision prohibits the General Assembly from granting extra compensation, fees or allowances to a public officer, agent or servant after service has been rendered. Likewise, a government

The Honorable Kenneth B. Jacob

agency which derives its power and authority from the Constitution and laws of this state would be prohibited from granting extra compensation in the form of bonuses to public officers or servants after the service has been rendered. Missouri Attorney General Opinion No. 72, Pray, June 14, 1955, at page 5.

We believe the foregoing case law and the 1955 opinion correctly reflect current law.

From the facts available to us, it appears that the employees of the State Treasurer's office received additional compensation for one month for services rendered that month. The employees provided services to the state during June, 1986, and the payments represented part of their compensation for those services. Therefore, it is our opinion that such payments did not violate Article III, Section 39(3) of the Missouri Constitution.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

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65102

P. O. Box 899  
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August 5, 1987

OPINION LETTER NO. 115-87

The Honorable William C. Linton  
Representative, District 91  
State Capitol Building, Room 105-J  
Jefferson City, Missouri 65101

FILED  
115

Dear Representative Linton:

This opinion letter is in response to your question asking whether the chairman of the board of trustees of a village serves a one-year term as chairman pursuant to Section 80.060, RSMo 1986, or whether the chairman serves a two-year term as chairman pursuant to Section 80.120, RSMo 1986, if at the time of his election as chairman his remaining term as a member of the board is two years.

Section 80.060, RSMo 1986, provides:

80.060. Trustees -- oath -- organization -- meetings. -- Every trustee, before entering upon the duties of his office, shall take the oath prescribed by the constitution of this state, and that he will faithfully demean himself in office. Every board of trustees shall assemble within twenty days after their appointment or election, and choose a chairman of their number, and some other person as clerk. The chairman may vote on any proposition before the board. The board of trustees, by ordinance, shall fix the time and place of holding their stated meetings, and may be convened by the chairman at any time.

(Emphasis added.)

Section 80.120, RSMo 1986, provides:

The Honorable William C. Linton

80.120. Trustees -- publication of ordinances -- chairman. -- The chairman of the board shall cause to be printed and published the bylaws and ordinances of the board, for the information of the inhabitants, and cause the same to be carried into effect. He shall remain in office for the term for which he is appointed or elected as a trustee; but in case of his absence at any meeting of the board, the board may appoint a chairman pro tempore, and in case he shall die, resign, be removed from office or remove from the town, the board of trustees shall appoint one of their number chairman, who shall hold the office for the unexpired term.

(Emphasis added.)

Section 80.040, RSMo 1986, provides:

80.040. Board of trustees -- corporate powers vested in -- terms of office. -- The corporate powers and duties of every village so incorporated shall be vested in a board of trustees, to consist of five members, unless such town shall contain more than twenty-five hundred inhabitants, in which case such board may consist of nine members, the number to be determined by a vote of the voters of such village. The first board of trustees shall be appointed by the county commission at the time of declaring such town incorporated. If the board consists of five members the county commission shall designate two members who shall serve for terms of two years and three members who shall serve for terms of one year. If the board consists of nine members the county commission shall designate four members who shall serve for terms of two years and five members who shall serve for terms of one year. Thereafter all members shall serve for terms of two years and until their successors are elected and qualified.

Statutes relating to the same subject are to be considered together and harmonized if possible so as to give meaning to

The Honorable William C. Linton

all provisions of each. State ex rel. Lebeau v. Kelly, 697 S.W.2d 312 (Mo.App. 1985). Where one statute deals with a particular subject in a general way, and a second statute treats part of the same subject in a more detailed way, the more general should give way to the more specific. O'Flaherty v. State Tax Commission of Missouri, 680 S.W.2d 153 (Mo. banc 1984).

In applying the foregoing rules of statutory construction to the situation you have presented, we conclude that the chairman serves a one-year term as chairman. Because of the staggered terms of board members, some board members are elected each year. Section 80.060 specifically provides for the board to assemble within twenty days after their election and choose a chairman. To give effect to this provision, a chairman is to be selected each year after the election of board members.

Therefore, it is the opinion of this office that the chairman of the board of trustees of a village is to be selected each year pursuant to Section 80.060, RSMo 1986.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY  
65102

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
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October 2, 1987

OPINION LETTER NO. 118-87

Mr. Carl M. Koupal, Jr.  
Director  
Department of Economic Development  
Post Office Box 1157  
Jefferson City, Missouri 65102

FILED

118

Dear Mr. Koupal:

This opinion letter is in response to your questions asking:

(a) Is a corporation, association, partnership, or are individuals of a business, which receives an advance fee and which publishes a multiple listing service distributed to subscribing real estate licensees to be used by real estate licensees for information about the properties listed in the publication, required to be licensed as a real estate broker under § 339.010.1 (9), RSMo 1986 or exempted from licensure under § 339.010.5 (9), RSMo 1986?

(b) Is a corporation, association, partnership, or are individuals of a business which receives an advance fee in connection with a contract whereby they agree to promote the sale of real estate through the listing in a publication issued solely for the purpose of referral of information to real estate brokers required to be licensed as a real estate broker under § 339.010.1 (9), RSMo 1986 or exempted from licensure under § 339.010.5 (9), RSMo 1986?

(c) Is a corporation, association, partnership, or are individuals of a business which receives an advance fee and

Mr. Carl M. Koupal, Jr.

which either publishes a home buying guide which is distributed to the public separately and not as a part of a newspaper, magazine or periodical of general circulation or publishes a home buying guide which is distributed to the public both separately and as an insert in a regular edition of a newspaper required to be licensed as a real estate broker under § 339.010.1 (9), RSMo 1986 or exempted from licensure, under § 339.010.5 (9), RSMo 1986?

Some of the statutory sections applicable to your questions were amended by the General Assembly in 1987 in Senate Bill No. 175, 84th General Assembly, First Regular Session (hereinafter "S.B. 175"). We will address your questions under the law as amended by S.B. 175.

It is unlawful for any person, copartnership, association or corporation to act as a real estate broker or salesperson without a license from the Missouri Real Estate Commission. Section 339.020, RSMo 1986. Section 339.040, RSMo 1986, provides that licenses may be granted to persons who bear a good reputation for honesty, integrity, fair dealing and who are competent to transact the business of a real estate broker in such a manner as to safeguard the interest of the public.

Section 339.010 of S.B. 175 defines a real estate broker, in pertinent part, as follows:

1. A "real estate broker" is any person, copartnership, association or corporation, foreign or domestic who, for another, and for a compensation or valuable consideration, as a whole or partial vocation does, or attempts to do, any or all of the following:

\* \* \*

(9) Engages in the business of charging an advance fee in connection with any contract whereby he undertakes to promote the sale of real estate either through its listing in a publication issued for such purpose or for referral of information concerning such real estate to brokers or both;

Mr. Carl M. Koupal, Jr.

Section 339.010.5 of S.B. 175 also specifically exempts particular persons or entities from the provisions of Chapter 339, RSMo, and provides in pertinent part:

5. The provisions of this chapter shall not apply to:

\* \* \*

(9) Any newspaper or magazine or periodical of general circulation whereby the advertising of real estate is incidental to the operation of that publication or to any form of communications regulated or licensed by the Federal Communications Commission or any successor agency or commission;

(Emphasis added.)

In interpreting a statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). The statute may also be interpreted by examining its purpose, the nature of the problems sought to be remedied by its enactment, and the circumstances and conditions existing at the time of enactment. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983).

The provisions of Chapter 339 were enacted to protect the public from fraud and incompetence and will be strictly construed against anyone claiming an exemption. Mueller v. Ruddy, 617 S.W.2d 466, 474 (Mo.App. 1981); Gilbert v. Edwards, 276 S.W.2d 611, 617 (Mo.App. 1955).

The plain language of Section 339.010.1(9) requires those who engage in the business of charging an advance fee in connection with a contract to promote the sale of real estate either through its listing in a publication issued for such purpose or for referral of information concerning real estate to brokers to be licensed as a real estate broker. The promotion of real estate may be either directly to the public through the listing in a publication issued to promote real estate to the public or through the referral of such information to real estate brokers.

Mr. Carl M. Koupal, Jr.

Next, we consider the exemption provision of Section 339.010.5(9). The key word in this provision is "incidental" which means "secondary or minor, but usually associated." Webster's New World Dictionary (Second College Edition 1984). Therefore, any newspaper, magazine or periodical of general circulation which carries advertising promoting real estate that is secondary or incidental to the operation of the publication is specifically exempted from Chapter 339 and the requirement of licensure as a real estate broker.

Turning to the specific questions you posed, question (a) concerns persons or business entities that receive an advance fee and publish a multiple listing service distributed to subscribing real estate licensees. These persons or business entities are within the definition of real estate broker under Section 339.010.1(9) and are not exempt under Section 339.010.5(9). Therefore, these persons or business entities must be licensed as real estate brokers.

Question (b) concerns persons or business entities that receive an advance fee and promote the sale of real estate through the listing in a publication issued solely for the purpose of referral of information to real estate brokers. These persons or business entities are within the definition of real estate broker under Section 339.010.1(9) and are not exempt under Section 339.010.5(9). Therefore, these persons or business entities must be licensed as real estate brokers.

Question (c) contains two parts. The first part of your question concerns a home buying guide which is distributed to the public separately and not as a part of a newspaper, magazine or periodical of general circulation. These persons or business entities that receive an advance fee are within the definition of real estate broker under Section 339.010.1(9) and are not exempt under Section 339.010.5(9). Therefore, these persons or business entities must be licensed as real estate brokers.

The second part of question (c) concerns a home buying guide which is distributed to the public both separately and as an insert in a regular edition of a newspaper. The examples which you provided of this type of home buying guide appear to be the real estate section of a general circulation newspaper printed so that it can be separately distributed. The newspaper subscribers automatically receive this section of the newspaper and additional copies of the section are made available to the public. These persons or business entities that receive an advance fee are real estate brokers under Section 339.010.1(9); however, in our opinion, they are exempt from Chapter 339 and the requirement of licensure as a real estate broker by Section

Mr. Carl M. Koupal, Jr.

339.010.5(9). The publication of the section of the newspaper entitled "home buying guide," even though it is also separately distributed to the public, is incidental to the operation of the newspaper and, therefore, these persons and business entities are exempt under Section 339.010.5(9).

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

CANDIDATES: In order for a person to be eligible for  
SHERIFFS: the office of sheriff under Section  
57.010, RSMo 1986, such person need not  
have been a registered voter of that county for one whole year  
before filing for that office.

October 2, 1987

OPINION NO. 126-87

The Honorable Norman L. Merrell  
Senator, District 18  
State Capitol Building, Room 423  
Jefferson City, Missouri 65101

FILED  
126

Dear Senator Merrell:

This opinion is in response to your question asking:

Does Section 57.010, RSMo 1986, require  
that a person who runs for sheriff must  
have been a registered voter of said county  
for one whole year before filing for that  
office?

Section 57.010, RSMo 1986, provides as follows:

57.010. Election -- qualifications --  
certificate of election. -- At the general  
election to be held in 1948, and at each  
general election held every four years  
thereafter, the voters in every county in  
this state shall elect some suitable person  
sheriff. No person shall be eligible for  
the office of sheriff who has been con-  
victed of a felony. Such person shall be  
a resident taxpayer and elector of said  
county, shall have resided in said county  
for more than one whole year next before  
filing for said office and shall be a  
person capable of efficient law enforce-  
ment. When any person shall be elected  
sheriff, he shall enter upon the discharge  
of the duties of his office on the first  
day of January next succeeding his election.

(Emphasis added.)

The primary rule of statutory construction is to ascertain the  
intent of the lawmakers from the language used, to give effect

The Honorable Norman L. Merrell

to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986). The statute sets forth five requirements which a person must meet in order to be eligible for the office of sheriff:

- (1) The person shall not have been convicted of a felony.
- (2) The person must be a resident taxpayer of the county for which he is elected sheriff.
- (3) The person must be an elector of the county for which he is elected sheriff.
- (4) The person must have resided in the county for which he is elected sheriff for more than one whole year next before filing for said office.
- (5) The person must be capable of efficient law enforcement.

The one-year requirement applies only to residency and does not apply to being an elector. In other words, a person who is otherwise eligible under Section 57.010 may file for sheriff even if he has not been an elector for one year prior to the filing as long as he has been a resident<sup>1</sup> of the county in which he files for one year prior to the filing.

#### CONCLUSION

It is the opinion of this office that in order for a person to be eligible for the office of sheriff under Section 57.010, RSMo 1986, such person need not have been a registered voter of that county for one whole year before filing for that office.

Very truly yours,

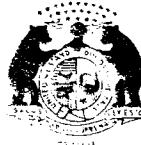
  
WILLIAM L. WEBSTER  
Attorney General

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<sup>1</sup> The issue of residence is one of fact. Residence is largely a matter of intention, to be determined not only from the utterances of the person whose residence is in issue but also from his acts and in the light of all the facts and

The Honorable Norman L. Merrell

circumstances of the case. State ex rel. King v. Walsh, 484 S.W.2d 641 (Mo. banc 1972). Being registered to vote in said county is evidence of residency there but is not conclusive. See In Re Marriage of Bradford, 557 S.W.2d 720 (Mo.App. 1977); and In Re Ozias' Estate, 29 S.W.2d 240 (Mo.App. 1930). See also State ex rel. King v. Walsh, supra.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

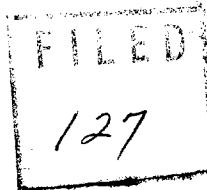
WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
(314) 751-3321

December 18, 1987

OPINION LETTER NO. 127-87

The Honorable Roger B. Wilson  
Senator, District 19  
State Capitol Building, Room 227  
Jefferson City, Missouri 65101



Dear Senator Wilson:

This opinion letter is in response to your question regarding the legality of selling and advertising for sale look-alike wraparounds for cans that may contain alcoholic beverages. The wraparounds to which you refer are used to disguise cans containing beer so that such cans resemble Pepsi or 7-Up cans. You indicate concern that such wraparounds aid and promote underage drinking.

We have reviewed Missouri's state statutes and find no statute prohibiting the sale or advertising for sale of such wraparounds. Therefore, it is the opinion of this office that there is no state statute in Missouri presently prohibiting the sale or the advertising for sale of such wraparounds.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".

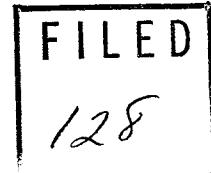
WILLIAM L. WEBSTER  
Attorney General

DEPARTMENT OF PUBLIC SAFETY: Water patrolmen do not have  
DIVISION OF WATER SAFETY: jurisdiction on all waterways of  
this state but only upon the  
waterways enumerated in Section 306.165, RSMo 1986, as described  
herein. Their jurisdiction upon land is as described herein.

October 30, 1987

OPINION NO. 128-87

Richard C. Rice, Director  
Department of Public Safety  
Post Office Box 749  
Jefferson City, Missouri 65102



Dear Mr. Rice:

This opinion is in response to your question asking:

Does the jurisdiction of a Water Patrolman appointed by the Division of Water Safety extend to all the waterways of this state and all land adjoining within 600 feet?

The jurisdiction of water patrolmen is specifically set out in Section 306.165, RSMo 1986, which provides:

Section 306.165. Water patrolman, powers, duties and jurisdiction of. -- Each water patrolman appointed by the division of water safety and each of such other employees as may be designated by the division, before entering upon his duties, shall take and subscribe an oath of office to perform his duties faithfully and impartially, and shall be given a certificate of appointment, a copy of which shall be filed with the secretary of state, granting him all the powers of a peace officer to enforce all laws of this state, upon all of the following:

(1) The waterways of this state bordering the lands set forth in subdivisions (2), (3), (4), and (5) of this section;

(2) All federal land, where not prohibited by federal law or regulation,

Richard C. Rice, Director

and state land adjoining the waterways of this state;

(3) All land within three hundred feet of the areas in subdivision (2) of this section;

(4) All land adjoining and within six hundred feet of any waters impounded in areas not covered in subdivision (2) with a shoreline in excess of four miles;

(5) All land adjoining and within six hundred feet of the Mississippi, Missouri, Grand and Osage rivers and such rivers as empty into said rivers for a distance of five miles from the mouth thereof, excluding therefrom all incorporated cities, towns and villages; provided, however, the waterways adjacent to the incorporated cities, towns and villages on said rivers are included in subdivision (1) hereof. . .

.

In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect wherever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). In determining the legislature's intent it is appropriate to review the legislative history for guidance. Pippin v. City of Springfield, 596 S.W.2d 770, 775 (Mo.App. 1980).

Under previous versions of Chapter 306, water patrolmen were designated "deputy boat commissioners." In 1971 the legislature enacted Senate Bill No. 2, 76th General Assembly, First Regular Session, which amended Section 306.165 to read, in part, that each deputy boat commissioner "shall be given a certificate of appointment, a copy of which shall be filed with the secretary of state, granting him all the powers of a peace officer to enforce all laws of this state upon any of its waterways, except for search and seizure." (Emphasis added). In 1977, however, the legislature amended Section 306.165 through Senate Bill No. 194, 79th General Assembly, First Regular Session, to reflect the statute's current restrictions. "A change in a statute is intended to have some effect,

Richard C. Rice, Director

and the legislature will not be charged with having done a meaningless act." State v. Swoboda, 658 S.W.2d 24, 26 (Mo. banc 1983); Staley v. Missouri Director of Revenue, 623 S.W.2d 246, 250 (Mo. banc 1981).

In reviewing the jurisdiction of water patrolmen as set forth in the five subsections of Section 306.165, it is perhaps easiest to view the jurisdiction in three categories as follows:

1. all federal land, where not prohibited by federal law or regulation, adjoining the waterways of this state and state land adjoining the waterways of this state (subsection 2) and all other land within three hundred (300) feet of such land (subsection 3) and the waterways of this state bordering such land (subsection 1);

2. all land adjoining and within six hundred (600) feet of any waters impounded in areas not covered above with a shoreline in excess of four (4) miles (subsection 4) and the waterways of this state bordering such land (subsection 1);

3.A. all land adjoining and within six hundred (600) feet of (1) the Mississippi River, (2) the Missouri River, (3) the Grand River, (4) the Osage River, (5) a part of any river that enters into any of the four rivers listed above which part is from the mouth of such river to a distance of five (5) miles upriver from the mouth, excluding from this subcategory A the land in all incorporated cities, towns and villages (subsection 5); and

B. (1) the Mississippi River, (2) the Missouri River, (3) the Grand River, (4) the Osage River, and (5) a part of any river that enters into any of the four rivers listed above which part is from the mouth of such river to a distance of five (5) miles upriver from the mouth (subsections 1 and 5).

Therefore, in direct answer to your question, the jurisdiction of a water patrolman does not extend to all the waterways of the state and all land adjoining within six hundred (600) feet. Instead, the jurisdiction of a water patrolman is as set forth in Section 306.165.

Richard C. Rice, Director

CONCLUSION

Water patrolmen do not have jurisdiction on all waterways of this state but only upon the waterways enumerated in Section 306.165, RSMO 1986, as described herein. Their jurisdiction upon land is as described herein.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

July 17, 1987

OPINION LETTER NO. 132-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Secretary Blunt:

FILED  
132

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Article X of the Missouri Constitution by adopting two new sections, Sections 25 and 26. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 9, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

July 17, 1987

OPINION LETTER NO. 133-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

133

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the revision of Chapter 143, RSMo, and specifically the addition of one new section to be known as Section 143.807. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 9, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".

WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
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July 17, 1987

OPINION LETTER NO. 134-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
134

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 17, 20 and 22 of Article X. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 9, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

July 17, 1987

OPINION LETTER NO. 135-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
135

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 1 and 11(c) of Article X. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 9, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosure

HIGHER EDUCATION, DEPARTMENT OF:  
LIBRARIES:  
PUBLIC RECORDS:  
RECORDS:  
SOVEREIGN IMMUNITY:  
SUNSHINE LAW:  
STATE LIBRARY:

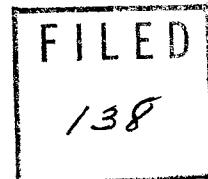
The Missouri State Library,  
the libraries of Missouri  
public institutions of  
higher education and local  
public libraries formed  
under Chapter 182, RSMO  
1986, can enter into the  
restrictions on the copying

of records received from OCLC as those restrictions are set forth in Appendix 3 to the OCLC/MLNC agreement and in the Principles and Guidelines attached thereto without violating state laws regarding the availability of governmental records for copying by the public, but the aforementioned governmental entities may not enter into the hold harmless clause in paragraph 10 of Appendix 3 to the OCLC/MLNC agreement because to do so would be an unauthorized waiver of sovereign immunity.

December 18, 1987

OPINION NO. 138-87

Shaila R. Aery  
Commissioner of Higher Education  
Coordinating Board for Higher Education  
101 Adams Street  
Jefferson City, Missouri 65101



Dear Commissioner Aery:

This opinion is in response to your question asking:

Is it legally permissible for any or all of the Missouri State Library, the public libraries of Missouri or the libraries of Missouri public institutions of higher education to enter into a contract for services which incorporate the Principles and Guidelines for Transfer of OCLC-Derived Machine-Readable Records?

Online Computer Library Center (OCLC) is a not-for-profit corporation in Dublin, Ohio. It operates a computerized cataloging service which utilizes a shared database of bibliographic records. OCLC provides the computer storage and software necessary to create and manipulate the records, and parties who contract with OCLC or with OCLC's brokers create the records by entering the necessary data on their holdings through computer terminals located at each library.

Shaila R. Aery

OCLC makes its processes, products and services available to "user" libraries, such as the Missouri State Library, through a broker named Missouri Library Network Corporation (MLNC). OCLC and MLNC enter into a contract and as a part of that contract MLNC promises that any users of the processes, products or services of OCLC (such as the State Library) must "undertake not less than the responsibilities described in Appendix 3 to this Agreement". Paragraph 9 of Appendix 3 provides in pertinent part:

9. The use and transfer by Users of OCLC-Derived Records (as defined below) received from OCLC or otherwise obtained during the term of this or a preceding agreement with OCLC, and supplied by OCLC on OCLC/MARC Subscription tapes, Local Database Creation tapes or MICROCON Program output tapes, including derivative works made from such records, will be in accordance with the latest revision received from time to time of the document

Principles and Guidelines for Transfer of OCLC-Derived Machine-Readable Records, a copy of the current version of which is attached hereto as Exhibit 1 [emphasis in original]. However, if, within sixty (60) days after a User's receipt of a new revision of that document, the institution or other entity which has contracted on behalf of User gives Network notice of termination of their agreement, then the new revision of the document will not replace the existing version as to such entity and User. As to OCLC-Derived Records other than those supplied by OCLC on OCLC/MARC Subscription tapes, Local Database Creation tapes or MICROCON Program output tapes, User will not permit online access to the records or derivative works except to their end user patrons, nor will they transfer copies of such records or derivative works in machine-readable form to any entity, except as OCLC and the contracting entity may otherwise agree in writing. Users' rights include non-exclusive licenses permitting the Users to use, copy, display and distribute the catalog records and derivative works referred to above under all copyrights

Shaila R. Aery

owned or controlled by OCLC and by Network. In the event of any breach of this provision by a User, its liabilities will be limited to those arising in contract, and will not include liabilities arising under the copyright laws of the United States or other jurisdictions. The rights and obligations of Users and their contracting entities under this provision shall survive any expiration or termination of their agreements with Network. As used herein, "OCLC-Derived Records" means, as to any User, all records stored in the OCLC Online Union Catalog other than (i) records designated in such catalog as original cataloging by the User, and (ii) records to which the User's holding symbol has been attached by Tapeloading. . . .

(Emphasis added.)

The Principles and Guidelines for Transfer of OCLC-Derived Machine-Readable Records (Principles and Guidelines) are attached to this opinion as Exhibit 1. Examples of restrictions placed on the State Library's use of the computer tapes are as follows (please refer to the attached Principles and Guidelines for definitions of terms "member library", "nonmember library", "member network", "third party", "records", "transfer", and "transfer of records"):

### I. Principles

The Guidelines described below have been established in accordance with the following principles:

\* \* \*

3. OCLC believes that its member libraries and member networks will act with good faith toward OCLC and other member libraries. OCLC will not invoke copyright against any member libraries with which contracts have been executed which incorporate these Principles and Guidelines, but OCLC reserves its right to invoke copyright against uses by third parties not authorized by OCLC under the Guidelines below or under separate agreement.

Shaila R. Aery

## II. Guidelines

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings, to any library or group of libraries. Each nonmember library to which transfers of records are made under this guideline shall first agree (in a form approved by and with a copy furnished to OCLC) to accept these Principles and Guidelines as to records received.

\* \* \*

3. Each member and nonmember library may transfer records to third parties, subject to prior written agreements with OCLC. Excluded from this requirement for prior written agreements, however, are any transfers that may be made to third parties under Guideline 2 above. Each member and nonmember library may transfer records of its own holdings to third party vendors for COM production or other record-processing purposes, provided that each third party vendor has first signed an agreement with the library (in a form approved by OCLC and with a copy furnished to OCLC) that the third party will not copy or use the records except to carry out the work contracted for, will not transfer the records to other entities and will return all copies of the records upon the request of the library which has engaged it.

(Emphasis added.)

## I. RESTRICTIONS ON COPYING OF RECORDS

### A. State Library.

The State Library, as a library User, would be allowed to enter its card catalog entries and bibliographic information on new materials into OCLC's database, along with the entries of local libraries if OCLC permits it. These entries would go into OCLC's nationwide databank which contains entries from all over the country and entries from the Library of Congress. The User

Shaila R. Aery

and its patrons would have access to this databank to determine such things as the existence and location of publications. OCLC provides to the User two different types of computer tapes: (1) a tape containing the records of an individual library provided to that library and (2) a multi-institutional tape containing records of institutions which have given permission for their records to be received by the requesting library. These tapes can be useful in several areas, including the management of library inventory and circulation. In order for a library such as the State Library to become a User, it must sign the agreement with MLNC which contains at least the provisions of Appendix 3 of the Network Agreement which MLNC would have signed with OCLC. As shown above, these provisions prohibit the State Library, as a User, from giving the tapes, or parts thereof, which it has obtained from OCLC to third parties who have not also become bound by the provisions of Appendix 3. This is to prevent third parties from copying the tapes without obtaining OCLC's permission and is for the purpose of allowing OCLC to control how the records are used.

The issue arises as to whether the restrictions on the State Library as a User pertaining to the providing of copies of the computer tapes it receives from OCLC to parties who do not have agreements with OCLC or MLNC violate the requirements of state law concerning the right of the public to copy public records.

Before the enactment of the Open Records Law, Sections 610.010 to 610.030, RSMo,<sup>1</sup> the general legal principles on the availability of government records to the public were set forth in Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (Mo.App. 1955) as follows:

Generally, any writing or document constituting a public record is subject to inspection by the public. [citation omitted] . . . And the right to inspect carries with it the right to make copies. [Citation omitted.] Id. at 223.

These principles are still the law even subsequent to the passage of the Open Records Law. State ex rel. Gray v. Brigham, 622 S.W.2d 734, 735 (Mo.App. 1981).

Missouri's statutes on government records consist of the Open Records Law cited above and the State and Local Records Law at Sections 109.200 to 109.310, RSMo 1986.<sup>2</sup> The Open Records Law is applicable if the State Library is a "public governmental body" as that term is defined in Section 610.010(2) and if the

Shaila R. Aery

computer tapes are "public records" as that term is defined in Section 610.010(4). Section 610.010(2) defines a "public governmental body" to include any "administrative governmental entity created by the . . . statutes of this state . . . ." The State Library is established in Chapter 181, RSMO 1986. Therefore, it is a "public governmental body".

Whether a computer tape is a "public record" and thereby subject to public inspection and copying is a question not yet addressed by Missouri courts. The definition of "public record" in Section 610.010(4) provides:

(4) "Public record", any record retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds; provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

There is no further definition of the term "record" provided in the Open Records Law. However, there is a definition of "record" in Section 109.210(5) of the State and Local Records Law which provides:

(5) "Record", document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of records as used in sections 109.200 to 109.310, and are

Shaila R. Aery

hereinafter designated as "nonrecord" materials;

The computer tapes in question would be "other material, regardless of physical form or characteristics, . . . received . . . in connection with the transaction of official business." This conclusion is supported by the Supreme Court of New Hampshire's decision that this same language in the New Hampshire statute, RSA 8-B:7, includes computer tapes. Menge v. City of Manchester, 311 A.2d 116, 118 (N.H. 1973). Courts in other states have also decided that the right to inspect and copy a public record is no different if that record is in the form of a computer tape, absent contrary statutory provisions. Minnesota Medical Association v. State of Minnesota, 274 N.W.2d 84 (Mn. 1978); Seigle v. Barry, 422 S.2d 63, 65 (Fl.App. 1982); Ortiz v. Jaramillo, 483 P.2d 500, 501-502 (N.M. 1971); Martin v. Ellisor, 223 S.E.2d 415, 418 (S.C. 1976).

Not all public records under the Open Records Law have to be open records. Section 610.021 provides:

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

[Subsections (1) through (13) and (15) are omitted.]

(14) Records which are protected from disclosure by law;

The above-quoted provisions from Appendix 3 and the Principles and Guidelines demonstrate that OCLC has drafted the contract in a way to protect the records generated under its contract, including the computer tapes, from copyright infringement. We have information that other entities which have contributed to the data bank are also applying for copyrights. Federal copyright statutes generally prohibit the copying of copyrighted works without the authorization of the owner of the copyright. 17 U.S.C. § 106 provides in part:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

Shaila R. Aery

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;"

\* \* \*

These general prohibitions are modified by subsequent sections dealing with "fair use" (§ 107), reproduction by libraries (§ 108) and other matters (§§ 109 et seq.). Whether OCLC's copyright can be successfully challenged in court or whether the State Library's copying and transferring of these tapes can be defended under §§ 107 et seq., presents substantial questions of law and need not be determined at this point. There are legitimate issues as to whether the copyright laws would be broken by the State Library allowing the general public to copy the OCLC tapes. The Open Records Law allows a public governmental body to restrict the copying of its records by rendering them "closed" if the records fall within one of the categories set forth in Section 610.021. A record restricted from being copied by federal copyright law is a record "protected from disclosure by law" under subsection 14 of Section 610.021 to the extent that it is protected from being copied. Given the copyright issues involved and given the fact that the information on these tapes which was obtained from the State Library's original records is still available for inspection and copying from those latter records, the restrictions of Appendix 3 and the Principles and Guidelines may be agreed to by the State Library without violation of state laws regarding the inspection and copying of government records.

#### B. Other Libraries.

It is unnecessary to decide whether local public libraries and libraries of Missouri public institutions of higher education are "public governmental bodies" under the Open Records Law and whether these OCLC computer tapes would be considered public records of those bodies if they should sign contracts with OCLC and MLNC. Even assuming they would be public governmental bodies and public records, the Open Records Law would not prevent them from entering into the terms of Appendix 3 regarding the restrictions on the copying of those records for the same reasons as set forth regarding the State Library.

Shaila R. Aery

## II. HOLD HARMLESS CLAUSE

There is a ground upon which we would advise that the State Library should not sign the User agreement as contained in Appendix 3. Under Article V, Section B (p.18), of the Network Agreement, Users must sign an agreement containing not less than the responsibilities provided for in Appendix 3. Paragraph 10 of Appendix 3 (p.5) provides:

10. Each User grants to OCLC, its other Users or designees the irrevocable, non-exclusive, royalty-free, sublicenseable, world-wide right to use, copy, display, publish, prepare derivative works from and distribute all bibliographic records, library holdings and other information furnished to OCLC during the term of this Agreement by User or any entity acting on its behalf, under any copyright, patent, secrecy or other proprietary right therein owned or controlled by User, for all purposes consistent with the corporate purposes set out in OCLC's Articles of Incorporation as hereafter amended from time to time. User warrants that no use, reproduction or transfer by OCLC, its other Users or designees of such bibliographic, holdings or other information will infringe any copyright, patent, trademark, secrecy or other proprietary rights owned or controlled by third parties, and User agrees to defend, indemnify and hold Network and OCLC harmless from claims to the contrary.

(Emphasis added.)

To agree to the underlined terms, as presently worded, is to waive the state's sovereign immunity, that is, the legal prohibition against the state being sued in its own courts for damages from the torts of its officers and agents. Only the legislature can waive this immunity.

The sovereign immunity of the state and its entities may be waived only by the legislature, not by officers, agents or employees of the state [citation omitted]. To the extent that the contract with plaintiff as a student may be construed as obligating

Shaila R. Aery

the university to respond in damages for the injury, the contract is void because beyond the capacity and authority of any officer or employee of the university.

Fowler v. Board of Regents for Central Missouri State University, 637 S.W.2d 352, 354 (Mo.App. 1982).

Arriving at the same conclusion are Attorney General Opinion No. 78, Summers, 1972 and Attorney General Opinion No. 37, Harris, May 22, 1950. A copy of each is enclosed.

Based on these legal authorities, the State Library could not sign such an agreement unless it had express legislative authority to do so. It does not have such authority. The only waivers of sovereign immunity presently enacted by the legislature are contained in Section 537.600.1, RSMo 1986, and pertain to motor vehicle accidents and dangerous conditions on state property. They would not apply to the subject matter of paragraph 10 of Appendix 3. Furthermore, there has been no legislative authorization by way of appropriations specific to this contract as in V.S. DiCarlo Construction Company, Incorporated v. State, 485 S.W.2d 52 (Mo. 1972).

These same principles of sovereign immunity and waivers therefrom apply to libraries of Missouri public institutions of higher education. Fowler v. Board of Regents for Central Missouri State University, supra.

As for county library districts under Sections 182.010 to 182.130, RSMo 1986, city libraries under Sections 182.140 to 182.280, RSMo 1986, city-county libraries under Sections 182.291 to 182.301, RSMo 1986, and municipal library districts under Sections 182.480 to 182.510, RSMo 1986, they are separate legal entities and are political subdivisions of this state. See Attorney General Opinion No. 20, O'Halloran, 1972, a copy of which is enclosed; Section 70.210, RSMo 1986; and Section 182.480. Consolidated public library districts under Sections 182.610 to 182.670, RSMo 1986, are also political subdivisions of this state. Section 182.630. As political subdivisions, they enjoy the state's sovereign immunity. McConnell v. St. Louis County, 655 S.W.2d 654, 656 (Mo.App. 1983). This immunity, again, is waivable only by an act of the legislature. Cassidy v. City of St. Joseph, 247 Mo. 197, 152 S.W. 306, 309 (1912), and Page v. Metropolitan St. Louis Sewer District, 377 S.W.2d 348, 352 (Mo. 1964). The only applicable statute is Section 537.600.1 pertaining to automobile accidents and dangerous conditions on property. These waivers are clearly not applicable here. Therefore, there is no authority for local

Shaila R. Aery

public libraries to waive sovereign immunity through the provisions of paragraph 10 of Appendix 3.<sup>3</sup>

#### CONCLUSION

It is the opinion of this office that the Missouri State Library, the libraries of Missouri public institutions of higher education and local public libraries formed under Chapter 182, RSMo 1986, can enter into the restrictions on the copying of records received from OCLC as those restrictions are set forth in Appendix 3 to the OCLC/MLNC agreement and in the Principles and Guidelines attached thereto without violating state laws regarding the availability of governmental records for copying by the public, but the aforementioned governmental entities may not enter into the hold harmless clause in paragraph 10 of Appendix 3 to the OCLC/MLNC agreement because to do so would be an unauthorized waiver of sovereign immunity.

Sincerely,



WILLIAM L. WEBSTER  
Attorney General

Enclosures:

- Opinion No. 78, Summers, 1972
- Opinion No. 20, O'Halloran, 1972
- Opinion No. 37, Harris, May 22, 1950

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<sup>1</sup> References herein to the statutory sections comprising the Open Records Law are to Revised Statutes of Missouri, 1986 as amended by House Committee Substitute for Senate Substitute for Senate Bill No. 2, 84th General Assembly, First Regular Session.

<sup>2</sup> Sections 182.815 and 182.817, RSMo 1986, govern the disclosure of "library records". However, as the term "library record" is defined in Section 182.815(3), it includes only those records that identify "a person or persons as having requested, used, or borrowed library material". The tapes with which we are concerned here do not come within that definition.

Section 109.180, RSMo 1986, grants the public the right to inspect records "kept pursuant to statute" "[e]xcept as otherwise provided by law". This latter phrase incorporates the closed records provisions discussed in the text of this opinion. Therefore, the issues involved in this opinion request

Shaila R. Aery

can be resolved without deciding whether these computer tapes are "kept pursuant to statute".

<sup>3</sup> As to the State Library and Missouri public institutions of higher education, there are also substantial problems with hold harmless clauses under the provisions of Article III, Section 39, Missouri Constitution (as amended 1986) which prohibits the General Assembly from having the power:

(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;

There is also a question under Section 33.040, RSMo 1986, whether an agency can enter into such a limitless contingent liability without express authority of law. State ex rel. Armontrout v. Smith, 182 S.W.2d 571, 573-574 (Mo. banc 1944).

The constitution contains analogous provisions concerning the lending of credit and contracting of debts beyond a certain limitation for political subdivisions of this state, such as local libraries. Article VI, Section 23, Missouri Constitution provides:

No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

See also Article VI, Section 25, Missouri Constitution. Article VI, Section 26(a), Missouri Constitution, provides:

No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years,

Shaila R. Aery

except as otherwise provided in this  
constitution."

An agreement to indemnify can be considered a "lending of credit". McQuillin Mun. Corp. (3d Ed) Volume 15, Section 39.30. See also St. Charles City-County Library District v. St. Charles Library Building Corporation, 627 S.W.2d 64 (Mo.App. 1981): "The purpose of the constitutional prohibition against the lending of credit is to prohibit the state or a political subdivision from acting as a surety or guarantor of the debt of another." Id. at 69.

## I. Principles

(See Definitions in Part III below.)

The Guidelines described below have been established in accordance with the following principles:

1. The continued growth and enrichment of the OCLC database for the benefit of the OCLC membership and the library world in general is both necessary and desirable.
2. The sharing of information in all formats, including machine-readable records, among members of the library world in general is both necessary and desirable.
3. OCLC believes that its member libraries and member networks will act with good faith toward OCLC and other member libraries. OCLC will not invoke copyright against any member libraries with which contracts have been executed which incorporate these Principles and Guidelines, but OCLC reserves its right to invoke copyright against uses by third parties not authorized by OCLC under the Guidelines below or under separate agreement.

## II. Guidelines

(See Definitions in Part III below.)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings, to any library or group of libraries. Each nonmember library to which transfers of records are made under this guideline shall first agree (in a form approved by and with a copy furnished to OCLC) to accept these Principles and Guidelines as to records received.
2. Each member and nonmember library may transfer records of its own holdings, without restriction, to (i) member networks; (ii) state and multi-state library agencies (in addition to those state libraries to which transfers can be made under Guideline 1 above); and (iii) other bibliographic organizations which are exempt from the payment of federal income taxes (or equivalent foreign taxes in the case of non-U.S. organizations). The use and transfer of records by member networks, library systems operated by or under the aegis of one or more state library agencies, and other tax-exempt bibliographic organizations will be as provided in separate understandings with OCLC. In the event that a group of libraries to which transfers of records are made under Guideline 1 above is a library system operated by or under the aegis of one or more state library agencies, then this Guideline 2 will apply to the use and transfer of records by that group.
3. Each member and nonmember library may transfer records to third parties, subject to prior written agreements with OCLC. Excluded from this requirement for prior written agreements, however, are any transfers that may be made to third parties under Guideline 2 above. Each member and nonmember library may transfer records of its own holdings to third party vendors for COM production or other record-processing purposes, provided that each third party vendor has first signed an agreement with the library (in a form approved by OCLC and with a copy furnished to OCLC) that the third party will not copy or use the records except to carry out the work contracted for, will not transfer the records to other entities and will return all copies of the records upon the request of the library which has engaged it.

4. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, the libraries making the transfers will so inform OCLC and, together with the other participants in the union catalog, will exert their reasonable best efforts, on a voluntary basis, to provide OCLC copies of the union catalog's bibliographic holdings and titles when it is determined by OCLC that the holdings and titles of such union catalog would enhance the OCLC database. The addition of these holdings and titles to the OCLC database will be at OCLC expense. It is requested that the holdings and titles be provided at approximately semi-annual intervals on magnetic tape. Unless otherwise indicated prior to the time submitted to OCLC, the holdings and titles will be regarded as contributed permanently to the OCLC database for uses consistent with OCLC Articles of Incorporation.

5. Upon termination of its membership in OCLC, a former member library may transfer records of its holdings, without restriction, to any third party from which the library elects to obtain bibliographic cataloging services.
6. When a nonmember organization makes available to OCLC bibliographic information that is subject to usage or transfer restrictions, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information under these Guidelines will be subject to the same restrictions.

## III. Definitions

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "third party" is an entity or person other than OCLC and other than a member library, a nonmember library or a member network.
5. The term "records" means machine-readable bibliographic records and holdings data (including copies thereof) derived from the OCLC database and transferred by OCLC on OCLC-MARC Subscription tapes, Local Database Creation tapes and/or MICROCON Program output tapes (and records which, although available through such tape services, are acquired by electronic transfer from OCLC), or subsequently re-transferred by any other institution via any machine-readable media or electronic-based transmission, together with derivative works, in machine-readable form, made from such records and holdings data. However, records do not include, as to any member or nonmember library (i) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (ii) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to which its holdings symbol has been attached by tapeloading. Such excluded records, together

with OCLC-derived records in eye-readable form (including microform records) are freely transferable to third parties and are not dealt with in these Principles and Guidelines.

6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

#### **IV. Handling Requests and Appeals**

1. OCLC management will establish a Database Committee of OCLC staff members to consider and respond promptly to routine requests of libraries concerning transfers of records to third parties according to these Principles and Guidelines.
2. Disagreement may arise regarding the interpretation of these Guidelines. In the event a disagreement has not been resolved within a period of six months by a bona fide negotiation and discussion between OCLC and a library, the library may appeal to the OCLC Users Council for resolution unless the dispute is the subject of current or past litigation. The Users Council president will appoint three Users Council delegates to meet with two persons appointed by the President of OCLC and two persons appointed by the library to hear the issue. A majority decision of the seven-member panel will be final and binding on both parties. Each party to the agreement will be responsible for its own expenses in the appeal, and the expenses of the Users Council team will be borne equally by both parties. In such an appeal, the duty of the panel members is to apply these Principles and Guidelines as they existed at the time the dispute or disagreement arose.

#### **V. Maintaining the Currency of the Guidelines**

The OCLC Board of Trustees will establish a committee to study issues and problems arising from the interpretation of these Guidelines. The committee may recommend to the Board, from time to time, modifications to the Guidelines. The committee may also recommend policies to the Board on additional ways to protect the database and on the establishment of fees and licenses. It is contemplated that the committee appointed by the Board of Trustees will include representation from the OCLC Board, OCLC Users Council, OCLC management and the directors of OCLC-affiliated networks. However, the Board will seek the advice of the OCLC Users Council and the network directors prior to determining the exact composition of the committee. The committee may invite others from the library and information community to assist in addressing specific policy issues.

#### **VI. Modifications**

With respect to any entity which is a party, either directly or indirectly through an OCLC-affiliated network, to a contract with OCLC which references or incorporates this document, this document may be modified by the OCLC Board of Trustees, after consultation with the committee established under Part V above, upon ninety (90) days' prior written notice by OCLC to the other party or parties to the contract.



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

July 31, 1987

OPINION LETTER NO. 140-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

140

Dear Secretary Blunt:

This letter is in response to your letter dated July 24, 1987, submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMO 1986. This statement is to be the petition title for a proposed amendment to Article X, Sections 1 and 11(c) of the Missouri Constitution and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 135-87.

We approve the legal content and form of the proposed statement, a copy of which is enclosed.

Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure

TITLE

Shall Article X, Sections 1 and 11(c) of the Missouri Constitution be amended to require municipalities, counties, school districts and other political subdivisions to obtain two-thirds voter approval for all property tax increases including all school district property tax elections, and to limit property tax rate or bond proposals to one election each calendar year with such elections being held only on the regular municipal, primary or general election days, and to restrict bond related tax increases to retirement of principal and interest only?



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
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August 5, 1987

OPINION LETTER NO. 143-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

143

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Article X of the Missouri Constitution by adopting one new section, Section 25. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 29, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

*William L. Webster*

WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
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August 5, 1987

OPINION LETTER NO. 144-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
144

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 17, 20 and 22 of Article X. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 28, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
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August 5, 1987

OPINION LETTER NO. 145-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

145

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Chapter 143, RSMo, and specifically the addition of one new section to be known as Section 143.807. A copy of the initiative petition and the proposed amendment which you submitted to this office on July 29, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure

BONDS: The amount of the bond of the county  
COLLECTORS: collector in a third class county  
COUNTY COMMISSIONS: where the county commission has  
required daily deposits may not be in  
a sum less than one-fourth of the largest amount collected  
during any one month of the year immediately preceding the  
county collector's election or appointment, plus ten percent of  
the amount.

December 4, 1987

OPINION NO. 146-87

The Honorable Harry Hill  
Representative, District 2  
RR 1  
Novinger, Missouri 63559

FILED  
146

Dear Representative Hill:

This opinion is in response to your questions asking:

(1) Whether under Mo. Rev. Stat.  
§ 52.020.2 (1986) the county commission may  
require a bond of less than "the sum  
equal to one-fourth of the largest amount  
collected during any one month of the year  
immediately preceding his election or  
appointment, plus ten percent of the  
amount" when the commission has required  
the third or fourth class county collector  
to make daily deposits.

(2) Whether the payment of bond for  
one month in the amount specified in Mo.  
Rev. Stat. § 52.020.1 and the payment of  
less than "the sum equal to one-fourth of  
the largest amount collected ..." specified  
in Mo. Rev. Stat. § 50.020.2 for eleven  
months meets the bond requirement of Mo.  
Rev. Stat. §§ 52.020.1 and 52.020.2.

You have informed us that the county involved is a third  
class county and that the county commission has required the  
county collector to make daily deposits.

Section 52.020, RSMo 1986, provides:

52.020. Bond--deposits of  
collections. -- 1. Every collector of

The Honorable Harry Hill

the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county commissions, and, in the city of St. Louis, to the satisfaction of the mayor of the city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten percent of the amount; but no collector shall be required to give bond in excess of seven hundred and fifty thousand dollars. The bond shall be conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years constituting his term of office, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond shall be a surety bond with a surety company authorized to do business in this state. The premium of the bond shall be paid by the county or city protected by it.

2. In all third and fourth class counties the county commission may require the county collector to deposit daily all collections of money in the depositaries selected by the county commission in accordance with the provisions of sections 110.130 to 110.150, RSMo, to the credit of a fund to be known as "County Collector's Fund". The depositaries are bound to account for the moneys in the county collector's fund in the same manner as the public funds of every kind and description going into the hands of the county treasurer and shall provide security for the deposits in the manner required by section 110.010, RSMo. If daily deposits are required to be made, the county commissions may also require that the bond of the county collector shall be in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding his election or

The Honorable Harry Hill

appointment, plus ten percent of the amount. No county collector shall be required to make daily deposits for days when his collections do not total at least one hundred dollars.

3. The collector shall not check on the county collector's fund except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositaries.

(Emphasis added.)

In interpreting a statute, the primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986). Where the language of a statute is plain and admits of but one meaning, there is no room for construction and the statute must be construed as it stands. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986).

Subsection 2 of Section 52.020 allows a county commission which has required daily deposits to require a bond in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding the county collector's election or appointment, plus ten percent of the amount. The amount of the bond permitted under subsection 2 of Section 52.020 is substantially less than the amount of the bond required under the provisions of subsection 1 of Section 52.020. There is no statutory provision allowing the county commission to set the amount of the bond at less than the amount provided in subsection 2 of Section 52.020. Where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. State ex rel. State Highway Commission v. County of Camden, 394 S.W.2d 71 (Mo.App. 1965). Therefore, in response to your first question, the county commission may not require a bond less than the amount specified in subsection 2 of Section 52.020, a bond in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding the county collector's election or appointment, plus ten percent of the amount.

The Honorable Harry Hill

In your second question, you ask whether a bond for one month in the amount specified in subsection 1 of Section 52.020 and a bond for the other eleven months in a sum less than one-fourth of the largest amount collected during any one month of the year immediately preceding the county collector's election or appointment, plus ten percent of the amount would meet the requirements of Section 52.020. As previously discussed, the amount of the bond may not be less than that provided in subsection 2 of Section 52.020. The proposed bond as set forth in your second question does not meet the statutory requirement.

#### CONCLUSION

It is the opinion of this office that the amount of the bond of the county collector in a third class county where the county commission has required daily deposits may not be in a sum less than one-fourth of the largest amount collected during any one month of the year immediately preceding the county collector's election or appointment, plus ten percent of the amount.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

August 10, 1987

OPINION LETTER NO. 147-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Secretary Blunt:

FILED  
147

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to funding for certain educational purposes. A copy of the initiative petition was submitted to this office by letter dated July 31, 1987. We conclude that the petition must be rejected.

Section 116.050, RSMo 1986, provides:

116.050. Initiative and referendum petitions, requirements. -- Initiative and referendum petitions filed under the provisions of this chapter shall consist of pages of a uniform size. Each page, excluding the text of the measure, shall be no larger than eight and one-half by fourteen inches. Each page of an initiative petition shall be attached to or shall contain a full and correct text of the proposed measure. Each page of a referendum petition shall be attached to or shall contain a full and correct text of the measure on which the referendum is sought.

(Emphasis added.)

The page of which you provided us a copy is larger than eight and one-half by fourteen inches. Therefore, the form of the petition does not comply with Section 116.050 and must be rejected.

The Honorable Roy D. Blunt

Because of our rejection of the form of the petition for the reason stated above and because of the similarities of this petition to other petitions which you subsequently forwarded to us for our review, we have not reviewed the petition to determine if additional deficiencies exist.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
(314) 751-3321

August 13, 1987

OPINION LETTER NO. 153-87

The Honorable John Ashcroft  
Governor, State of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
153

Dear Governor Ashcroft:

You have requested that our office review Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216 & 231, 84th General Assembly, First Regular Session. In particular, the question you have posed relates to a possible conflict between Section 7.7 of the bill and Section 7.9 of the bill. Section 7.7 provides:

7. The salary commission shall establish the compensation for each office at an amount not greater than that set by law as the maximum compensation. If the salary commission votes not to pay the maximum amount authorized by law for any officer, then the compensation shall be expressed as a percentage of the maximum allowable compensation, and any officer whose compensation is being established by the commission at that time shall receive the same percentage of their maximum amount.

Section 7.9 provides:

9. The provisions of this section shall not require or permit a reduction in the amount of compensation received by any person holding office as of the effective date of this section.

The Honorable John Ashcroft

The question you have posed is whether (1) all county officers must receive the same percentage of the maximum as compensation with the percentage being set so that each officer receives compensation no less than that which he presently receives, or (2) the percentage may be set so as to provide no raises for any county officers and if that percentage would result in any particular officer receiving less compensation than at present, that officer can receive his present compensation even if it is a higher percentage of the maximum than the percentage received by another county officer.

For example, let us assume that in X County, Officer A's present compensation is \$20,000 and Officer B's present compensation is \$15,000. Let us further assume that the maximum compensation under the bill for Officer A is \$40,000 and for Officer B is \$25,000. If the salary commission sets the percentage at 60% so as to keep Officer B's compensation at not less than his present compensation ( $60\% \times \$25,000 = \$15,000$ ), then Officer A's compensation increases to \$24,000 ( $60\% \times \$40,000 = \$24,000$ ). Under this first scenario, the county would incur an additional \$4,000 in expense for compensation of these county officers. If, on the other hand, the salary commission sets the percentage at 50% so Officer A does not receive an increase in compensation ( $50\% \times \$40,000 = \$20,000$ ), then Officer B would receive less compensation than at present ( $50\% \times \$25,000 = \$12,500$ ) so, in order to comply with Section 7.9 of the bill, Officer B's compensation would be \$15,000. Under this second scenario, the county would not incur any additional expense for compensation of these county officers.

The question you have posed involves a construction of two possible conflicting provisions in the same bill. The first rule of statutory construction is to give effect to the intent of the legislature. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986). All provisions of a legislative act should be construed together and harmonized if possible. State ex rel. McCubbin v. McMillian, 349 S.W.2d 453 (Mo.App. 1961). Apparently conflicting provisions of a statute should be construed if possible to give effect to both. State ex rel. McGrath v. McNeal, 591 S.W.2d 54 (Mo.App. 1979).

Based on the foregoing rules of statutory construction, it is the opinion of this office that the salary commission could set the percentage at a percentage so that no county officer receives an increase in his compensation. If that percentage would result in a county officer receiving a reduction in his present compensation, such officer would not receive his

The Honorable John Ashcroft

compensation based upon the percentage but would continue to receive his present compensation.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
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August 14, 1987

OPINION LETTER NO. 154-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
154

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to funding for certain educational purposes. A copy of the initiative petition and the proposed law which you submitted to this office on August 5, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

August 14, 1987

OPINION LETTER NO. 155-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Secretary Blunt:



This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to funding for certain educational purposes. A copy of the initiative petition and the proposed law which you submitted to this office on August 6, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature of William L. Webster.

WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
(314) 751-3321

August 21, 1987

OPINION LETTER NO. 158-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
Missouri State Capitol Building  
Jefferson City, Missouri 65101

FILED  
158

Dear Secretary Blunt:

This letter is in response to your letter dated August 13, 1987, submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. A copy of your letter containing the proposed statement is attached. This statement is to be the petition title for a proposed amendment to Article X of the Missouri Constitution and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 143-87.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".

WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
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August 21, 1987

OPINION LETTER NO. 159-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
Missouri State Capitol Building  
Jefferson City, Missouri 65101

FILED

159

Dear Secretary Blunt:

This letter is in response to your letter dated August 13, 1987, submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. A copy of your letter containing the proposed statement is attached. This statement is to be the petition title for a proposed amendment to Article X, Sections 17, 20 and 22 of the Missouri Constitution and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 144-87.

We approve the legal content and form of the proposed statement. We understand that the underlining is not part of the proposed statement and is intended only to assist us in our review. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

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August 21, 1987

OPINION LETTER NO. 160-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
Missouri State Capitol Building  
Jefferson City, Missouri 65101

FILED

160

Dear Secretary Blunt:

This letter is in response to your letter dated August 13, 1987, submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. A copy of your letter containing the proposed statement is attached. This statement is to be the petition title for a proposed amendment to Chapter 143, RSMo, and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 145-87.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

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August 28, 1987

OPINION LETTER NO. 162-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
162

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

"Shall the statutes of Missouri be amended to require an increase in the corporate income tax (from 5 to 6 1/2 percent) and the sales tax (by three-fourths of one cent), the proceeds of which shall be used to establish a "School Projects Trust Fund" for elementary and secondary education, establishing the distribution guidelines for such fund, and further providing certain minimum requirements to be met by school districts in order to qualify for state aid?"

See our Opinion Letter No. 155-87.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".

WILLIAM L. WEBSTER  
Attorney General

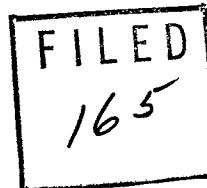
ATTORNEYS:  
CITY ATTORNEY:  
CITIES, TOWNS AND VILLAGES:  
FOURTH CLASS CITIES:

A fourth class city may allocate funds to pay for attorney fees on behalf of the members of the board of aldermen and the mayor when they are sued in their official capacity under the facts described herein.

December 4, 1987

OPINION NO. 165-87

William Camm Seay  
Dent County Prosecuting Attorney  
Post Office Box 418  
Salem, Missouri 65560



Dear Mr. Seay:

This opinion is in response to your question asking:

Whether or not a Fourth Class City may allocate funds to pay for attorney fees on behalf of individual members of the Board of Aldermen and Mayor who have been sued in their official capacity.

According to the information you submitted, this question arises as a result of a lawsuit brought by two former members of the police department against the fourth class city, the mayor and some individual members of the board of aldermen. The lawsuit arises from the termination of the two former city employees. All individuals named as defendants have been sued in their official capacities.

In State ex rel. Lack v. Melton, 692 S.W.2d 302 (Mo. banc 1985), the Missouri Supreme Court considered whether a county commission was entitled to use county funds to compensate outside counsel to represent it in a mandamus proceeding. The county assessor filed for writ of mandamus ordering members of the county commission to pay the salary of an employee of the assessor's office and, subsequently, a separate action was brought to enjoin the use of county funds to compensate outside counsel who represented the county commission in the mandamus proceeding. In authorizing the payment by the county of compensation for outside counsel, the Court stated:

Section 56.250, RSMo Supp. 1984,  
authorizes the county commission to employ  
special counsel to represent the county.

William Camm Seay

A previous version of the statute was interpreted in *County of St. Francois v. Brookshire*, 302 S.W.2d 1 (Mo.1957). *Brookshire* developed from a county court's refusal to issue a warrant to increase the pay of a deputy circuit clerk. A circuit court judge ordered payment but the county court judges refused. They were held in contempt and hired an attorney to represent them in the contempt proceedings. In *Brookshire* the Court explained that county courts can only operate under powers conferred by statute and members of a county court cannot use county funds to employ attorneys in private matters. Contempt proceedings are individual and beyond the statutory grant of authority. The Court noted that "it may be assumed that the county had an interest in whether the increased salary should be paid to the deputy clerk." *Id.* at 3. Presumably, county funds could have been used in the suit to issue the warrant. This is the current situation. The county commission members were sued in their official as well as individual capacity. Dade County had an interest in the result of the mandamus proceeding. The injunction was improperly issued and is reversed. *Id.* at 305.

(Emphasis added.)

Section 79.230, RSMo 1986, relating to fourth class cities, provides:

79.230. Appointive officers. -- The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a ... city attorney, ... and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city

William Camm Seay

attorney, and pay reasonable compensation therefor, and . . . .

Section 79.230 authorizes the city to employ special counsel to represent the city and pay reasonable compensation therefor. This authority is similar to the authority in Section 56.250, RSMo Supp. 1984, to which the Court looked in State ex rel. Lack v. Melton, supra. Just as in Melton where the county commission members were sued in their official as well as individual capacity, in the situation about which you are concerned, the city officials are sued in their official capacity. The city involved has an interest in the result of the case just as the Court in Melton determined that Dade County had an interest in the result of that proceeding. Based upon the decision of the Missouri Supreme Court in Melton, we conclude that in the specific situation about which you are concerned the city is authorized to pay for attorney fees on behalf of the individual members of the board of aldermen and mayor who have been sued in their official capacity.

#### CONCLUSION

It is the opinion of this office that a fourth class city may allocate funds to pay for attorney fees on behalf of the members of the board of aldermen and the mayor when they are sued in their official capacity under the facts described herein.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

DEPARTMENT OF REVENUE:

LOTTERIES:

LOTTERY COMMISSION:

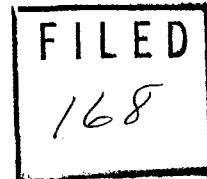
The decision whether to enter into an agreement with other states for operation of a joint on-line game as discussed herein

rests solely with the State Lottery Commission. Provided that the proposed joint on-line game complies with the restrictions in the Missouri Constitution and applicable state statutes, the State Lottery Commission is not foreclosed from participating in such multi-state game. These constitutional and statutory restrictions include, among others, the following: (1) Of moneys received from the sale of Missouri state lottery tickets a maximum of forty-five percent shall be awarded as prizes, a maximum of ten percent shall pay all commissions, administration and promotion costs, and a minimum of forty-five percent shall be deposited in the state treasury to the credit of the general revenue fund. (2) Advertising shall provide only statistical information setting forth the odds of winning and the average return on the dollar in prize money to the public and strict factual statements of (a) the time, date and place of conducting the lottery; (b) the prize structure; (c) the type of lottery game being conducted; (d) the price of tickets; and (e) the locations where tickets for the Missouri state lottery are sold. Advertising shall not be designed to induce persons to participate in the lottery.

September 24, 1987

OPINION NO. 168-87

Mr. Paul S. McNeill, Jr.  
Director  
Department of Revenue  
Post Office Box 311  
Jefferson City, Missouri 65105



Dear Mr. McNeill:

This opinion is in response to your question asking:

May the Missouri State Lottery Commission enter into a written agreement with other states and/or the District of Columbia for the participation and operation of a joint on-line game?

We have been provided the following additional facts regarding the proposed joint on-line game. Tickets will be sold in Missouri by the lottery game retailers. The proceeds from the sale of tickets for the joint on-line game will be handled in the same fashion as proceeds from other games are now handled;

Mr. Paul S. McNeill, Jr.

however, a percentage of the proceeds which are allocated to prizes will be pooled with similar funds from other states so as to create a larger jackpot. The percentage of proceeds from the sale of tickets in Missouri allocated to prizes will be within the limit imposed by the Missouri Constitution and statutes. Each state participating in the joint on-line game will conduct its own advertising so there can be compliance in Missouri with the restrictions in the Missouri Constitution and statutes regarding advertising. In effect, the joint on-line game being considered provides for pooling of prize money among states so as to be able to offer a larger jackpot; however, most aspects of the game are administered by each state which participates in the multi-state pool of prize money.

Neither the Missouri Constitution nor applicable state statutes directly address whether the State of Missouri may conduct a joint on-line game. Article III, Section 39(b) of the Missouri Constitution states that "[t]he general assembly shall have authority to authorize a Missouri state lottery." Nothing in Article III, Section 39(b) further defines or limits the types of lottery games the legislature is empowered to authorize. In implementing this constitutional amendment, the legislature created the "State Lottery Commission" with the mandate to "control and manage the state lottery." Section 313.210, RSMO 1986. The legislature also provided that:

The commission shall promulgate such rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable to fully implement the mandate of the people expressed in the approval of the lottery amendment to article III of the Missouri Constitution at the general election in November, 1984.

Section 313.220, RSMo 1986. There is no applicable constitutional or statutory provision which expressly prohibits the State Lottery Commission from implementing the proposed joint on-line game.

The next issue is whether the terms "Missouri state lottery" and "state lottery," as used in the applicable constitutional and statutory provisions, prohibit any participation by Missouri in lottery games in cooperation with other states. Specifically, the question is whether the terms "Missouri state" and "state," as used to modify the term "lottery," are intended to exclude this state's participation in a joint on-line game such as described previously.

Mr. Paul S. McNeill, Jr.

Certain general principles of constitutional and statutory construction are pertinent. Generally, the rules applicable to constitutional construction are the same as those applied to statutory construction, except that the former are given a broader construction, due to their more permanent character.

Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. banc 1982). "The fundamental rule of constitutional construction is that courts must give effect to the intent of the people in adopting the amendment . . ." Barnes v. Bailey, 706 S.W.2d 25, 28 (Mo. banc 1986). Similarly, "[t]he court must . . . consider the purpose or goal of the statute and any relevant conditions existing at the time it was enacted." State v. White, 622 S.W.2d 939, 944 (Mo. banc 1981). Thus, in construing either constitutional or statutory provisions, the primary objective is to determine the purpose of those who adopted the measure and to give it effect.

The purpose behind the lottery amendment specifying that the legislature may authorize a "Missouri state" lottery is clarified by a recent discussion of the history of lotteries and lottery regulation. In Barnes, the Missouri Supreme Court noted that "[d]uring the late eighteenth and early nineteenth centuries, lotteries were commonplace." Barnes, 706 S.W.2d at 30. While such lotteries were generally authorized by the state legislatures, the proceeds were often used to finance local public improvements or even to support purely private institutions. Id. Due to widespread evangelism, however, lotteries fell into disfavor and came to be regarded as a particular form of gambling meriting special prohibition. Id. Missouri, like most all other states, adopted laws banning lotteries. Id.

With the recent decline of federal funding for state and local programs, interest was revived in the use of lotteries as a source of revenue for states. However, no similar impetus arose to reinstate lotteries as a means of raising funds for private purposes. It is within this historical context that the voters of Missouri enacted Article III, Section 39(b), which authorized "a Missouri state lottery." Viewed from this perspective, the voters, in authorizing the legislature to enact a "state lottery" as opposed to "a lottery" or "lotteries," apparently intended to preclude the legislature from returning to past practices and authorizing lotteries for private as well as public beneficiaries.

Given this interpretation of the constitutional language, it follows that the same interpretation should be applied to the corresponding statutory references, since the apparent purpose of the legislature in enacting the state lottery statutes was to authorize precisely the same sort of lottery which the people

Mr. Paul S. McNeill, Jr.

intended to authorize in the lottery amendment. This intention can be found in Section 313.220, which authorizes the State Lottery Commission to:

[P]romulgate such rules and regulations governing the establishment and operation of a state lottery as its deems necessary and desirable to fully implement the mandate of the people expressed in the approval of the lottery amendment to article III of the Missouri Constitution at the general election in November, 1984.

Thus, in adopting the lottery amendment's language through the use of the terms "Missouri state lottery" and "state lottery," the legislature apparently intended the same modification of the term "lottery" as that intended by the people. That is, that the lottery authorized be one which inured to the benefit of the State of Missouri.

Additional authority for the proposition that the State Lottery Commission may implement the proposed joint on-line game may be found in the definition of "lottery game". "Lottery game" or "game" is defined in Section 313.205(7), RSMo 1986, as:

[A]ny procedure authorized by written rule of the commission whereby prizes are distributed among persons who have paid, or have unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes.

(Emphasis added.)

The use of the term "any" when modifying a noun, is to be construed to be "all-comprehensive, and is equivalent to 'every'." State ex rel. Sayad v. Zych, 642 S.W.2d 907, 911 (Mo. banc 1982); Boone County Court, supra, 631 S.W. 2d at 325.

The State Lottery Commission must comply with the requirements of the Missouri Constitution and applicable state statutes when conducting the joint on-line game. These constitutional and statutory restrictions include, among others, the following:

(1) Of moneys received from the sale of Missouri state lottery tickets a maximum of forty-five percent shall be awarded as prizes, a maximum of ten percent shall pay all commissions, administration and promotion costs, and a minimum

Mr. Paul S. McNeill, Jr.

of forty-five percent shall be deposited in the state treasury to the credit of the general revenue fund. Article III, Section 39(b) of the Missouri Constitution and Section 313.321, RSMo 1986.

(2) Advertising shall provide only statistical information setting forth the odds of winning and the average return on the dollar in prize money to the public and strict factual statements of (a) the time, date and place of conducting the lottery; (b) the prize structure; (c) the type of lottery game being conducted; (d) the price of tickets; and (e) the locations where tickets for the Missouri state lottery are sold. Advertising shall not be designed to induce persons to participate in the lottery. Article III, Section 39(b) of the Missouri Constitution and Section 313.335, RSMo 1986.

#### CONCLUSION

It is the opinion of this office that the decision whether to enter into an agreement with other states for operation of a joint on-line game as discussed previously rests solely with the State Lottery Commission. Provided that the proposed joint on-line game complies with the restrictions in the Missouri Constitution and applicable state statutes, the State Lottery Commission is not foreclosed from participating in such multi-state game. These constitutional and statutory restrictions include, among others, the following:

(1) Of moneys received from the sale of Missouri state lottery tickets a maximum of forty-five percent shall be awarded as prizes, a maximum of ten percent shall pay all commissions, administration and promotion costs, and a minimum of forty-five percent shall be deposited in the state treasury to the credit of the general revenue fund.

Mr. Paul S. McNeill, Jr.

(2) Advertising shall provide only statistical information setting forth the odds of winning and the average return on the dollar in prize money to the public and strict factual statements of (a) the time, date and place of conducting the lottery; (b) the prize structure; (c) the type of lottery game being conducted; (d) the price of tickets; and (e) the locations where tickets for the Missouri state lottery are sold. Advertising shall not be designed to induce persons to participate in the lottery.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

October 30, 1987

OPINION LETTER NO. 170-87

The Honorable Norman Merrell  
Senator, District 18  
State Capitol Building, Room 423  
Jefferson City, Missouri 65101

FILED  
170

Dear Senator Merrell:

This opinion letter is in response to your questions concerning Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216 & 231, 84th General Assembly, First Regular Session. The questions you posed are as follows:

Assuming that the salary commission does set salaries in such a way that the percentage would result in collectors receiving a reduction in present compensation, does Section 7.9 of the bill pertain to county collectors as well as all other county officers? Secondly, if the compensation as set forth in Senate Bill No. 65, et al, results in a reduction of compensation for county collectors, would other provisions of state law dictate that such compensation cannot be decreased during the county officers current term?

Section 7.6 of this bill provides:

At its meeting in 1987, the salary commission shall determine the compensation to be paid to every county officer holding office on January 1, 1988. At any meeting in following years, the salary commission shall determine the compensation to be paid to every county officer until the next meeting of the salary commission.

The Honorable Norman Merrell

Section 7.9 provides:

The provisions of this section shall not require or permit a reduction in the amount of compensation received by any person holding office as of the effective date of this section.

Section 7.9 of the bill does pertain to county collectors as well as other county officers. The "section" referred to in Section 7.9 is Section 7 which has been codified as Section 50.333, RSMo. Subsection 6 of Section 7, as set forth above, authorizes the salary commission to determine compensation to "every county officer." The term "county officer" has been defined to apply to officers whose "territorial jurisdiction is coextensive with the county for which they are elected or appointed." Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701 (Mo. 1926). County collectors meet this definition. Furthermore, Section 67.130, RSMo 1986, lists county collectors as one of a number of enumerated officers specifically designated as county officers. As such, the salary commission's authority for determining compensation for every "county officer" would include that of county collectors.

The salary commission's authority is, however, limited by subsection 9 of Section 7 which prevents the reduction of compensation "received by any person holding office as of the effective date of this section" which includes county collectors.

In addition to the above-cited subsection 9 of Section 7 which specifically prohibits the reduction of compensation for county officers, there is case law that indicates such compensation may not be reduced. In State ex rel. Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106, 1109 (banc 1917), the Missouri Supreme Court interpreted Article XIV, Section 8 of the then existing Missouri Constitution to forbid both "an increase or decrease of compensation during a term of office" for county officers. See also Thornsberry v. City of Campbell, 274 S.W. 847, 848 (Mo.App. 1925). This constitutional provision is now Article VII, Section 13 of the Missouri Constitution and states as follows:

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

The Honorable Norman Merrell

The validity of the courts' statements in the above-cited cases that this constitutional provision prohibits both an increase or decrease of compensation is, however, open to question since the Constitution itself refers only to increasing compensation. In addition, the St. Louis Court of Appeals in Lycett v. Wolff, 45 Mo.App. 489, 496 (St. L. 1891), stated that by reason of this constitutional section salaries "could not, probably, be increased during the plaintiff's term of office, but we do not see why a falling off in the population of the county, if the census subsequently taken so showed, might not, under the law of 1874, work a decrease." (Emphasis in original.) Having concluded that subsection 9 of Section 7 prevents a reduction in compensation for county collectors, it is not necessary to resolve whether there is a constitutional prohibition on such reduction.

A related question is the time period during which the amount of a county officer's compensation may not be reduced. The constitutional provision refers to "term of office" of county officers. The phrase "term of office" has been interpreted to mean the statutory length of time for the term of the particular office, whether the actual holder of that office changes during the term or not. State ex rel. Emmons v. Farmer, supra. Section 7.9 of the instant bill, however, refers not to compensation received during a term of office but compensation received "by any person holding office as of the effective date of this section." An individual may, of course, hold office longer than a single term. It would initially appear that an individual's salary as a county officer may not be decreased so long as that individual holds that office, regardless of how long or how many terms that individual remains in office after the effective date of Section 7.9.

Given this interpretation, compensation would then relate to a particular individual rather than the office or term of office. As such, a collector presently being paid more than the maximum amount authorized in this bill would continue to be paid that amount for each successive term of office, while a collector with similar responsibilities in a county of approximately the same assessed valuation who is elected to that office subsequent to the effective date of this bill would be paid a salary no higher than that set pursuant to the bill. It seems unlikely that the legislature would design a system whereby similarly-situated officers would be receiving significantly different compensation for the same or similar employment and that such disparity of compensation would continue indefinitely until such time as those individuals holding office at the effective date of this legislation would leave office.

The Honorable Norman Merrell

In addition, it seems illogical that the legislature would provide the compensation of county collectors to be as set forth in Section 52.269 as enacted by the bill, designate that compensation as appropriate for that particular office, and then allow an individual to receive compensation greater than, and perhaps significantly greater than, that amount for an indefinite period of time.

Legislation is not to be interpreted so as to reach an absurd or unreasonable result. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874 (Mo. banc 1983); State ex rel. McNary v. Hais, 670 S.W.2d 494 (Mo. banc 1984). Legislation should be construed so as to give effect to the apparent intent of the legislature. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986).

The apparent and reasonable intent of the legislature is that county collectors be compensated in accordance with the standards set forth in Section 52.269, but that individuals presently holding the position of county collector, who accepted that position with the expectation that the then existing compensation would continue during their term, not be penalized by having the compensation reduced through unanticipated legislative changes. In order to effectuate this intent, the prohibition against reducing compensation for county officers should prevent a decrease in compensation during the existing term of the county collector. This interpretation is in keeping with the policy forth in Article VII, Section 13, Missouri Constitution, as set forth above, which limits changes to compensation to a particular term of office rather than the total length of time that a particular individual may hold a given office.

The final issue concerns the computation of the amount of compensation to which the county collector is entitled if subsection 9 of Section 7 applies. Some county collectors are compensated on a commission basis. See Sections 52.250, 52.260, 52.270, and 52.290, RSMo 1986. In order for "the provisions of this section" to not require a reduction in the amount of compensation of the county collector, the amount of compensation the county collector would have received under the law as it existed before the enactment of the bill will need to be calculated. If the bill would require compensation of a lesser amount, then the county collector is entitled to the compensation he would have received under the law as it existed before the enactment of the bill.

The Honorable Norman Merrell

It is the opinion of this office that the compensation received by a county collector may not be decreased by virtue of the enactment of this bill during the present term of office of the county collector. At the expiration of this term of office, the provisions of Section 52.269 set a compensation limit for the county collector.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
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September 4, 1987

OPINION LETTER NO. 173-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

173

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to a proposed law to establish a fund to assist the homeless by a tax on sales of malt (beer) products, wine and spirits in Missouri. A copy of the initiative petition, including the proposed law, which you submitted to this office on August 28, 1987, is attached for reference.

We conclude the petition must be rejected as to form. We note the following deviations from the statutorily-prescribed form:

1. The statutory form provides a column for each signer of the petition to enter the date the petition was signed. See Section 116.040, RSMo 1986. The initiative petition submitted for our review does not contain a column for "Date Signed."
2. The initiative petition on the first page, fifth line after the proposed law, uses the phrase, "my street address." The phrase set forth in the statutory form is "my registered voting address." See Section 116.040, RSMo 1986.
3. The initiative petition near the bottom of the first page sets forth the column headings to appear above the signatures of the signers of the petition. The second column from the left is headed "Address." The column heading set forth in the statutory form is "Registered Voting Address." See Section 116.040, RSMo 1986.

The Honorable Roy D. Blunt

4. The initiative petition on the second page in the first line after the blanks for signatures of signers of the petition is as follows:

"signed these pages of the foregoing petition,  
and each of them his name thereto in"

The word "signed" was apparently inadvertently omitted.  
The statutory form for this line is as follows:

"signed this page of the foregoing petition,  
and each of them signed his name thereto in"

(Emphasis added)

See Section 116.040, RSMo 1986.

5. The initiative petition on the second page in the second line after the blanks for signatures of signers of the petition uses the phrase, "street address." The phrase set forth in the statutory form is "registered voting address." See Section 116.040, RSMo 1986.

Section 116.040, RSMo 1986 provides in part:

"If this form is followed substantially, it shall be sufficient, disregarding clerical and merely technical errors."

However, the deficiencies set forth above, particularly the omission of the column for "Date Signed" discussed in item 1 above, causes us to reject the petition as to form.

Because of our rejection of the form of the petition for the reasons stated above, we have not reviewed the petition to determine if additional deficiencies exist.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

Enclosure

CIRCUIT CLERKS: The circuit clerk may not invest funds deposited into the registry of the circuit court in mutual funds.

December 4, 1987

OPINION NO. 174-87

The Honorable John E. Scott  
Senator, District 3  
State Capitol Building, Room 416  
Jefferson City, Missouri 65101

FILED  
174

Dear Senator Scott:

This opinion is in response to your question asking:

May funds paid into the registry of a circuit court be invested in mutual funds?

Section 483.310, RSMo 1986, provides in part:

483.310. Investment of funds in registry in savings deposits -- income, how used -- clerk defined. -- 1. Whenever any funds are paid into the registry of any circuit court and the court determines, upon its own finding or after application by one of the parties, that such funds can be reasonably expected to remain on deposit for a period sufficient to provide income through investment, the court may make an order directing the clerk to deposit such funds as are described in the order in savings deposits in banks, savings and loan associations, or in United States treasury bills. Deposits of such funds in any bank or savings and loan association shall not exceed the limits of the federal deposit insurance on accounts in such institution. All such accounts shall be in the name of the "Clerk of the ..... Court as Trustee in ..... (Style and Cause Number)", the exact name to be prescribed in the court's order. The court may prescribe a bond or other guarantee for the security of the fund. Necessary costs,

The Honorable John E. Scott

including reasonable costs for administering the investment, may be paid from the income received from the investment of the trust fund. The net income so derived shall be added to and become a part of the principal.

2. In the absence of such an application by one of the parties within sixty days from the payment of such funds into the registry of the court, the clerk of the court may invest funds placed in the registry of the court in savings deposits in banks or savings and loan associations carrying federal deposit insurance to the extent of the insurance or in United States treasury bills and the income derived therefrom shall be used by the clerk for

• • •

\* \* \*

(Emphasis added.)

In Missouri Attorney General Opinion No. 145, Rabbitt, 1970, this office addressed a similar question. A copy of the opinion is enclosed. In that opinion, we considered whether the Clerk of the Circuit Court of the City of St. Louis could invest funds in United States Treasury Notes under Section 483.310, RSMo 1959. Section 483.310, RSMo 1959, only enumerated savings deposits in banks carrying federal deposit insurance as a permissible investment. Therefore, it was the conclusion of this office in Opinion No. 145, Rabbitt, 1970, that the clerk was not authorized to invest in United States Treasury Notes.

Since our 1970 opinion, Section 483.310 has been revised to enumerate additional permissible investments. However, the permissible investments now enumerated do not include mutual funds. Based upon the statutory rules of construction cited in the 1970 opinion, we conclude that the circuit clerk may only invest as specified in Section 483.310, RSMo 1986. Because the enumerated permissible investments do not include mutual funds, we conclude that the circuit clerk has no authority to invest in mutual funds.

The Honorable John E. Scott

CONCLUSION

It is the opinion of this office that the circuit clerk may not invest funds deposited into the registry of the circuit court in mutual funds.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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P. O. Box 899  
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September 15, 1987

OPINION LETTER NO. 178-87

The Honorable John E. Scott  
Senator, District 3  
State Capitol Building, Room 416  
Jefferson City, Missouri 65101

FILED  
178

Dear Senator Scott:

This opinion letter is in response to your question asking:

Is the Missouri control share acquisition statute as provided in Conference Committee Substitute for Senate Substitute for Senate Committee Substitute for House Bill No. 349, Eighty-fourth General Assembly, First Regular Session, applicable to the shares of an issuing public corporation where a person or group acquires a controlling interest in a holding company which is a Delaware corporation which owns or directs the exercise of voting power representing 20 percent or more of the voting power of an issuing Missouri public corporation?

Conference Committee Substitute for Senate Substitute for Senate Committee Substitute for House Bill No. 349, Eighty-fourth General Assembly, First Regular Session (hereinafter referred to as "H.B. 349") was recently enacted by the Missouri General Assembly. The bill was passed by the General Assembly June 15, 1987, and signed by the Governor on August 11, 1987. The provisions in the bill applicable to your question are effective September 28, 1987.

The facts relating to your inquiry are explicit in the question. There is a holding company which is incorporated in the state of Delaware. Apparently the controlling interest in that company is being acquired. The holding company owns shares of a Missouri corporation representing 20 percent or more of the voting power of that corporation. The Missouri corporation is an issuing public corporation as defined under Section 351.015(10) of H.B. 349.

The Honorable Jc . E. Scott

H.B. 349 amended Section 351.407, RSMo 1986. It was intended to closely track the control share acquisitions chapter of the Indiana Business Corporation Law, Indiana Code Section 23-1-42-1 et seq. (hereinafter referred to as "the Indiana Act"). The Indiana Act was recently the subject of a very favorable United States Supreme Court case known as CTS Corporation v. Dynamics Corporation of America, 481 U.S. \_\_\_, 109 S.Ct. \_\_\_, 95 L.Ed.2d 67 (1987). Therein the United States Supreme Court held that the Indiana law did not violate the Commerce Clause of the United States Constitution and was not preempted under what is known as the Williams Act.

"Control share acquisition" is defined in Section 351.015(4) of H.B. 349 to mean "the acquisition, directly or indirectly, by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares." (emphasis added.)

The acquisition of a sufficient number of shares of a Delaware holding company which has 20 percent or more of the voting power of a Missouri issuing public corporation is an indirect acquisition of the control shares of the Missouri issuing public corporation. See Section 351.015(4), (5) and (10) of H.B. 349. The holding company will be able to vote the control shares of the Missouri issuing public corporation to the extent the voting rights are conferred pursuant to Section 351.407.5 of H.B. 349 by vote of the shareholders of the issuing public corporation. The control shares being held by the holding company would be interested shares under Section 351.015(9) of H.B. 349 and, therefore, excluded from vote pursuant to Section 351.407.5(2)(b) of H.B. 349.

With respect to the CTS Corporation case, the court stated:

So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. 95 L.Ed.2d at 85.

Further, the court stated:

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corpora-

tions have an effective voice in corporate affairs. 95 L.Ed.2d at 86.

The United States Supreme Court recognized that a change of ownership or management may have important effects on the shareholders' interests and it is well within the state's role as an "overseer of corporate governance" to offer an opportunity to shareholders of the State's corporations to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. 95 L.Ed.2d at 86-87.

A review of H.B. 349 and the CTS Corporation case indicates that the Missouri law is consistent with the teachings of the United States Supreme Court. Missouri has a valid interest in regulating the affairs of its corporations including but not limited to the indirect acquisition of control shares of an issuing public corporation. Without a doubt if Section 351.407 did not apply to the shares of a subsidiary issuing public corporation, Missouri's ability to regulate the stability of the parties involved, as well as to ensure an effective vote in the corporate affairs, would be impaired. Shareholders have historically been given rights to submit and vote on significant matters regarding corporate governance and policy. Missouri has an interest in providing shareholders of an issuing public corporation an opportunity to review and collectively consider the desirability of a control share acquisition, not only with respect to the protection of the shareholders' investment but also with respect to the protection of the economic and social interests of the community and society involved in this state. Such interest includes employee turnover, relocation, change of business philosophy and direction, management ability, and long-term investment potential, all of which are significant implications for shareholder consideration. The philosophy behind CTS Corporation as enunciated by the United States Supreme Court is applicable to indirect acquisitions under the new Missouri control shares acquisition act. Therefore, the new Missouri act is not preempted by the Williams Act pursuant to the Supremacy Clause of the United States Constitution. The ability of the offerors to change management and operations of the issuing public corporation through acquisition of the holding company's shares may have important effects on the shareholders' interests.

Nothing in Section 351.407 indefinitely delays tender offers or prohibits a tender offerer from consummating an offer prior to the shareholder vote. As the Supreme Court suggested in CTS Corporation, the offerer could condition its tender offer for the holding company's shares upon the condition that the shares of the issuing public corporation in which the holding company holds an interest receive voting rights within a certain period of time. 95 L.Ed.2d at 82. The Supreme Court specifically held that "the possibility that the Indiana Act

will delay some tender offers is insufficient to require a conclusion that the Williams Act preempts the Act." 95 L.Ed.2d at 83. By analogy, the possibility of delay in some tender offers for holding companies of issuing public corporations should be considered insufficient to require a conclusion that the Williams Act preempts application of Section 351.407 to indirect acquisitions.

Moreover, it is incumbent to determine legislative intent from the plain and ordinary meaning of the words or phrases as they appear in H.B. 349. Section 1.090, RSMo 1986. State ex rel. Zoological Park Subdistrict of City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975). When considered in context, the word "indirectly" as used in the definitions of "control share acquisition" and "control shares" was intended by the Missouri legislature to apply to scenarios such as in your request.

Application of Section 351.407 is based on the acquisition, not the exercise, of voting power. Such application is supported by the language of Section 351.407.1 (". . . control shares . . . acquired in a control share acquisition . . ." [emphasis added]) and by the definitions of "control shares" and "control share acquisition." "Control shares" is specifically defined in Section 351.015(5) to mean "shares that . . . would entitle that person, immediately after acquisition of the shares, directly or indirectly, alone or as part of a group, to exercise or direct the exercise of the voting power . . ." (emphasis added). Furthermore, "control share acquisition" is defined in Section 351.015(4) to mean "the acquisition, directly or indirectly, by the person of ownership of, or the power to direct the exercise of voting power . . ." (emphasis added). Therefore, an acquiring person cannot avoid applicability of Section 351.407, and the protections provided thereunder, by electing not to exercise the voting power upon acquiring it.

Furthermore, the fact that after such an indirect acquisition there may remain corporate formalities or mechanics to complete before actually voting the subsidiary issuing public corporation's shares, such as taking whatever steps may be required for director or officer action necessary to vote such shares, does not mean that the acquiring person is not entitled upon such acquisition to exercise or direct the exercise of the voting power of the issuing public corporation.

Section 351.407 of H.B. 349 as thus interpreted does not restrict either (i) the ability of a person or group to acquire and vote shares of a holding company which is not an issuing public corporation, or (ii) the ability of such holding company to vote shares of corporations which are not issuing public corporations. Only the voting rights of shares of the issuing public corporation are subject to Section 351.407.

The Honorable John E. Scott

Therefore, it is the opinion of this office that the indirect acquisition of an issuing public corporation's shares through the acquisition of a controlling interest in a holding company of a sister state is within the definition of control share acquisition and control shares under Section 351.015(4) and (5), respectively, and is therefore subject to Section 351.407 of Conference Committee Substitute for Senate Substitute for Senate Committee Substitute for House Bill No. 349, Eighty-fourth General Assembly, First Regular Session.

Very truly yours,

*William L. Webster*

WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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October 30, 1987

OPINION LETTER NO. 179-87

Frederick A. Brunner, Ph.D., P.E.  
Director, Department of Natural Resources  
Post Office Box 176  
Jefferson City, Missouri 65102

FILED

179

Dear Dr. Brunner:

This opinion letter is in response to your questions concerning the expenditure of funds appropriated in Section 7.457 of Conference Committee Substitute for House Bill No. 7, 84th General Assembly, First Regular Session. The questions you posed can be summarized as follows:

1. Is it legally permissible for money raised from the additional sales and use taxes authorized by Section 47(a) of Article IV of the Missouri Constitution to be used for the repair of levees maintained by levee districts?

2. Does the appropriation in Section 7.457 of House Bill No. 7 allow the Department of Natural Resources to expend the funds appropriated in that section of the bill to levee districts for the repair of levees?

Section 47(a) of Article IV of the Missouri Constitution provides for the levy of a sales and use tax for the purpose of providing additional money for the conservation and management of the soil and water resources of the state and the control, management and regulation of the state parks and for the administration of the laws pertaining thereto. Section 47(b) of Article IV provides that any money raised from the additional sales and use taxes can be used by the Department of Natural Resources for the conservation and management of the soil and water resources of the state, for the control, management and regulation of the state parks and for the administration of the laws pertaining thereto and for no other purpose. Further, the

Frederick A. Brunner, Ph.D., P.E.

expenditure of said money shall be made pursuant to appropriation by the General Assembly.

Your first question concerns whether it is legally permissible for the revenue from the additional sales and use taxes to be expended to levee districts for the repair of levees. Among the permissible uses of the revenue set forth in the Constitution is "the conservation and management of the soil and water resources of the state." No definition of this phrase appears in this article of the Missouri Constitution. Words used in constitutional provisions are to be interpreted so as to give effect to their plain, ordinary and natural meaning. Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983). The maintenance of levees is certainly important in conserving and managing the soil and water resources of this state. Therefore, the plain, ordinary and natural meaning of "the conservation and management of the soil and water resources of the state" would include the maintenance of levees. In answer to your first question, it is our opinion that there is no constitutional prohibition upon the revenues from the additional sales and use taxes being used for the maintenance of levees if so appropriated by the General Assembly.

The second question you have posed concerns the appropriation involved, Section 7.457 of House Bill No. 7. The appropriation is as follows:

Section 7.457. To the Department of Natural Resources  
For the Division of Environmental Quality  
For the Soil and Water Conservation Program  
For public levy district local matching funds  
From Soil and Water Sales Tax Fund  
(0 F.T.E.) . . . . . \$672,000

Section 47(c) of Article IV of the Missouri Constitution provides in part:

All of the provisions of sections  
47(a)--(c) shall be self-enforcing except  
that the general assembly shall adjust  
brackets for the collection of the sales  
and use taxes. [Emphasis added.]

In State ex inf. McKittrick v. Wymore, 119 S.W.2d 941 (Mo. banc 1938), the Missouri Supreme Court stated:

"'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object

Frederick A. Brunner, Ph.D., P.E.

of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. \* \* \*

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.' \* \* \*" [Id. at 947.]

Because the provisions of Section 47(b) of Article IV are self-enforcing, the Department is authorized to expend the funds in accordance with that constitutional provision without additional legislation if such funds are appropriated by the General Assembly.

A final concern is that Section 7.457 of House Bill No. 7 uses the word "levy" when, in fact, the funds were probably intended for "levee" districts. Verbal inaccuracies or clerical errors or misprints in statutes will be corrected by a court if necessary to effectuate clear intent of the legislature. Deimeke v. State Highway Commission, 444 S.W.2d 480 (Mo. 1969). We do not deem fatal the apparent typographical error whereby the appropriation bill refers to "levy" where the apparent intent was "levee."

It is the opinion of this office that money raised from the additional sales and use taxes authorized by Section 47(a) of Article IV of the Missouri Constitution may be used for the repair of levees maintained by levee districts and that Section 7.457 of House Bill No. 7 allows the Department of Natural Resources to expend the funds appropriated in that section of the bill to levee districts for the repair of levees.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

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October 2, 1987

OPINION LETTER NO. 180-87

The Honorable Joe McCracken  
Representative, District 139  
State Capitol Building, Room 114  
Jefferson City, Missouri 65101

FILED  
180

Dear Representative McCracken:

This opinion letter is in response to your questions asking:

There is a chapel located in the Missouri Rehabilitation Center at Mt. Vernon, Missouri. The use of this facility is rather limited.

May a religious organization, thru guidance, guidelines and restrictions authored by the administration of the institution, use the chapel for worship purposes?

May the organization use the facility for an unlimited period of time?

May the organization use the facility if a fee is paid in return for approval?

You have provided the following additional information. There is a young church organization which is without a building to hold services. They would pay a fee for the use of the structure until they can obtain a new location.

Enclosed herein is a copy of Attorney General Opinion Letter No. 129, Robb, 1975, and a copy of Attorney General Opinion Letter No. 43, Cox, 1982, which address analogous situations. These opinion letters conclude that there must be statutory authority to allow a state agency to permit the use of

The Honorable Joe McCracken

its buildings and facilities for matters other than those related to the purposes and functions of the agency.

In this case, a church group wants to hold services for itself using the facilities of the Missouri Rehabilitation Center which facilities exist for the purpose of servicing the patients at that Center. There is no statutory authority for such a use. Therefore, it is the opinion of this office that such use is not legally permissible.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Opinion Letter No. 129, Robb, 1975  
Opinion Letter No. 43, Cox, 1982



## ATTORNEY GENERAL OF MISSOURI

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October 30, 1987

OPINION LETTER NO. 182-87

The Honorable Joseph L. Driskill  
Representative, District 154  
House Post Office  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
182

Dear Representative Driskill:

This opinion letter is in response to your questions concerning short-term borrowing by a county hospital in a third class county. The questions you posed are as follows:

- (1) Can county hospitals defined in Chapter 205, RSMo borrow funds in anticipation of revenues to be collected and, if so, what procedure should be followed?
- (2) Does the collector of revenue in third class counties have the authority under Chapter 52, RSMo or other related statutes to enter into agreements with a financial institution and a county hospital to disburse collected hospital funds jointly to both parties in repayment of a tax anticipation borrowing?
- (3) Does the county commission of a third class county have authority under Chapter 50, RSMo or other related statutes to issue tax anticipation notes on behalf of a county hospital?

Our office has addressed similar questions in prior opinions. Enclosed herewith is a copy of Opinion Letter No. 230, Reid, 1975, and a copy of Opinion No. 20, Crouch, 1961. In Opinion No. 20, Crouch, 1961, this office concluded that the county court (now the county commission) may in its

The Honorable Joseph L. Driskill

discretion issue tax anticipation notes payable out of the county health center fund, but the county health center has no power, as such, to borrow money. In Opinion Letter No. 230, Reid, 1975, this office concluded that the same principles apply to a county hospital.

Since the date of our opinion letter in 1975, there have been changes in the applicable statutes relating to county hospitals. Section 205.190, RSMo, was amended in 1982 to provide for the office of treasurer of the county hospital board of trustees. See House Bill No. 1069, 81st General Assembly, Second Regular Session. Despite this statutory change, we believe the conclusion and reasoning of our prior opinions is still applicable.

In summary, it is the opinion of this office that the county commission may issue tax anticipation notes in accordance with the provisions of Chapter 50, RSMo for the benefit of the county hospital, but that the county hospital as such has no power to borrow money on a short term basis from a financial institution.

Very truly yours,



WILLLIAM L. WEBSTER  
Attorney General



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September 24, 1987

OPINION LETTER NO. 186-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

186

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to a proposed law to establish a fund to assist the homeless by a tax on sales of malt (beer) products, wine and spirits in Missouri. A copy of the initiative petition, including the proposed law, which you submitted to this office on September 23, 1987, is attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster".  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

November 25, 1987

OPINION LETTER NO. 188-87

Hugh C. Harvey  
Prosecuting Attorney  
Saline County Courthouse  
Marshall, Missouri 65340

FILED

Dear Mr. Harvey:

This opinion letter is in response to your questions concerning Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216, and 231, 84th General Assembly, First Regular Session (hereinafter "the bill"). The questions you posed are as follows:

1. If the salary commission met on September 16, 1987 to vote on salary increases for county officeholders when the law did not become valid until September 28, 1987, was the meeting invalid and does the salary commission need to meet again?
2. If the salary commission establishes a percentage of the maximum as compensation at a level so low that no officer receives a raise, then will the "future" officeholders (those elected or re-elected in 1988 and future years) receive the percentage of the maximum voted by the salary commission, even if it involves the new officeholder receiving a salary cut; or will the salary continue at the present level in 1989 and future years?
3. If the answer to question 2 is yes, the future officeholders would take a cut; can the salary commission reconvene to amend the percentage so that no future officeholder takes a salary cut?

Hugh C. Harvey

Section 7 of the bill creates salary commissions for non-chartered counties and sets forth the procedures whereby these salary commissions are to meet and set compensation for county officers. No such salary commissions existed prior to the enactment of the bill.

The effective date of this section of the bill is established by Article III, Section 29 of the Missouri Constitution. This section states, in pertinent part:

No law passed by the general assembly, except an appropriation act, shall take effect until ninety days after the adjournment of the session in either odd-numbered or even-numbered years at which it was enacted.

Pursuant to this constitutional provision, the effective date of this section of the bill was September 28, 1987.

You have informed us the salary commission met on September 16, 1987, 12 days prior to the effective date of this legislation. The general rule is that a statute speaks from the time it goes into effect. Breest v. Helgemoe, 369 A.2d 612, 613 (N.H. 1977); 2 J. Sutherland, Statutes and Statutory Construction, Section 33.07 (4th Ed. C.Sands 1973). Before that time no rights may be acquired under it. Id.

In State ex rel. City of Charleston v. Holman, 355 S.W.2d 946 (Mo. banc 1962), the Missouri Supreme Court considered a situation where the legislature enacted a bill to implement two constitutional sections authorizing cities to issue general obligation bonds and revenue bonds for industrial development. This bill was passed and approved on June 26, 1961, and carried an emergency clause, the legality of which was challenged. In August, 1961, the city adopted an ordinance approving a plan and project for industrial development by construction of a building to be paid by general obligation bonds and an ordinance calling for an election of the voters to authorize the city to incur this indebtedness. The Missouri Supreme Court found that the emergency clause in this bill was not valid and that the bill, pursuant to the above-cited constitutional provision, did not, therefore, become effective until October 13, 1961, which was some two months after the actions taken by the city. The court further determined that any acts taken by the city prior to the effective date of this legislation were without authority of law. See also Petition of Monroe City, 359 S.W.2d 706 (Mo. banc 1962).

Hugh C. Harvey

In some instances action taken prior to the effective date of legislation may be acceptable, but such action must be of a preliminary nature and not affect substantive rights of any person. In Missouri Attorney General Opinion No. 237, Judd, 1977, a copy of which is enclosed, this office opined that actions undertaken by a local government in anticipation of forthcoming rights, when such activities are preliminary in nature and do not violate the substantive rights of persons affected, are not necessarily invalid. See also Vrooman v. City of St. Louis, 337 Mo. 933, 88 S.W.2d 189 (Mo. banc 1935).

In the instant matter, however, the meeting and vote of the salary commission was more than a mere preliminary matter. The vote taken by the commission altering the compensation for the county officers would certainly be deemed to be of a substantive nature affecting the rights of these persons. As such, the salary commission had no authority to vote prior to the effective date of this section of the bill. Any vote held before September 28, 1987, the effective date of this section of the bill, would be invalid. Sections 7.5 and 7.6 of the bill mandate that the salary commission shall meet before November 30, 1987, for the purpose of determining the compensation for county officers. Inasmuch as no valid and effective meeting and vote has yet occurred, the salary commission needs to hold such a meeting prior to November 30, 1987, for this purpose.

Your next question deals with whether setting the salaries as a percentage of the maximum compensation may result in a pay cut for future officeholders.

Section 7.6 of the bill states:

At its meeting in 1987, the salary commission shall determine the compensation to be paid to every county officer holding office on January 1, 1988. At any meeting in following years, the salary commission shall determine the compensation to be paid to every county officer until the next meeting of the salary commission.

Section 7.7 states:

The salary commission shall establish the compensation for each office at an amount not greater than that set by law as the maximum compensation. If the salary commission votes not to pay the maximum

Hugh C. Harvey

amount authorized by law for any officer, then the compensation shall be expressed as a percentage of the maximum allowable compensation, and any officer whose compensation is being established by the commission at that time shall receive the same percentage of their maximum amount.

Section 7.9 states:

The provisions of this section shall not require or permit a reduction in the amount of compensation received by any person holding office as of the effective date of this section.

This office addressed a question similar to your second question in Missouri Attorney General Opinion Letter No. 170-87, a copy of which is enclosed. In that opinion letter we conclude that the compensation received by a county collector may not be decreased by virtue of the enactment of this bill during the present term of office of the county collector. At the expiration of this term of office, however, the provisions of the bill set a compensation limit for the county collector.

If the salary commission, therefore, elects to establish compensation at ten percent of the maximum compensation authorized under the bill, then all officeholders commencing their next term of office before the next meeting of the salary commission will be paid only ten percent of the maximum allowable compensation beginning with the next term of office, whether the person holding office at that time is presently an officeholder or not.

Your third question deals with reconvening the salary commission and amending a prior vote of the salary commission. Enclosed is a copy of Missouri Attorney General Opinion Letter No. 199-87 wherein this office addressed this question and concluded that the salary commission can meet and consider and reconsider, as often as it chooses, up until November 30, 1987, the decision regarding the establishment of the compensation of county officers.

In summary, it is the opinion of this office that (1) the salary commission had no authority to vote prior to the effective date of this section of the bill, September 28, 1987, and any vote held before September 28, 1987, would be invalid, and (2) if the salary commission elects to establish compensation at ten percent of the maximum compensation

Hugh C. Harvey

authorized under the bill, then all officeholders commencing their next term of office before the next meeting of the salary commission will be paid only ten percent of the maximum allowable compensation beginning with the next term of office.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

Enclosures:

Attorney General Opinion No. 237, Judd, 1977  
Attorney General Opinion Letter No. 170-87  
Attorney General Opinion Letter No. 199-87



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

P. O. Box 899  
(314) 751-3321

October 9, 1987

OPINION LETTER NO. 190-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

190

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMO 1986. The statement which you have submitted is as follows:

Shall there be enacted a Missouri statute to tax the amount of beer, wine and spirits sold with the proceeds of that tax providing homeless persons with jobs, "one time" grants, salaries, interest free loans for homesteading, and drug and alcohol treatment shelters as well as providing matching grants for local governments providing programs for the homeless?

See our Opinion Letter No. 186-87.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

A handwritten signature of William L. Webster in black ink, appearing to read "WILLIAM L. WEBSTER".  
WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

October 22, 1987

OPINION LETTER NO. 195-87

The Honorable Roy D. Blunt  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

195

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 47(a), 47(b) and 47(c) of Article IV. A copy of the initiative petition and the proposed amendment which you submitted to this office on October 19, 1987, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

A handwritten signature of William L. Webster in black ink.  
WILLIAM L. WEBSTER  
Attorney General

Enclosure



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

October 30, 1987

OPINION LETTER NO. 196-87

The Honorable Norman Merrell  
Senator, District 18  
State Capitol Building, Room 423  
Jefferson City, Missouri 65101

FILED  
196

Dear Senator Merrell:

This opinion letter is in response to your question asking:

Is it permissible for the Clark County Nursing Home District to impose a property tax without voter approval under circumstances in which the district was created and authorized to impose property taxes in 1967, and the district's board of directors voluntarily discontinued the tax levy in 1977, and it remained discontinued on the effective date of Article X, Section 22 of the Missouri Constitution?

You have informed us that on May 29, 1967, the voters in Clark County established the Clark County Nursing Home District and authorized the district to impose a property tax not to exceed \$0.15 per \$100 assessed valuation. In 1977, the district's board of directors voluntarily discontinued the tax levy. The tax has not been imposed since.

On November 4, 1980, the voters in this state adopted what is commonly referred to as the Hancock Amendment. Article X, Section 22 of the Missouri Constitution, which was adopted as part of the Hancock Amendment, provides in part:

Section 22. Political subdivisions to receive voter approval for increases in taxes and fees -- rollbacks may be required -- limitation not applicable to taxes for bonds. (a) Counties and other political subdivisions are hereby prohibited from

The Honorable Norman Merrell

levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. ...

In 1980, at the time of the adoption of this constitutional section, the Clark County Nursing Home District did not impose the property tax in question.

In Wenzlaff v. Lawton, 653 S.W.2d 215 (Mo. banc 1983), the Missouri Supreme Court in interpreting this provision stated:

We first observe that § 22(a) contains two separate and distinct clauses. We think it is clear that the first clause prohibits political subdivisions from levying, without voter approval, a tax that was not authorized by law when the Amendment was adopted. We think it equally clear that the second clause requires voter approval before there can be an increase in the current levy of an existing tax above the current levy authorized by law on November 4, 1980.

Here, the cities increased the current levy of the taxes in question above the current levy in effect on November 4, 1980. They contend they have the authority, under the Amendment, to increase property taxes, without the required approval of the voters, up to the maximum rate authorized by law. This argument ignores the second clause of § 22(a) and the language therein concerning "current levy of an existing tax."

\* \* \*

In considering the provisions as a whole, in harmony with all other provisions, we reject cities' contention.

The Honorable Norman Merrell

To do otherwise would amount to an unnatural construction and render the second clause meaningless. Our conclusion is consistent with the objectives of the Amendment as understood by the voters. The official ballot title for the Amendment specifically informed the electorate that it "prohibits local tax or fee increases without popular vote." [Emphasis in original.] Id. at 216-217.

\* \* \*

The levy of the Clark County Nursing Home District at the time of the adoption of the Hancock Amendment was zero. Applying the reasoning set forth in Wenzlaff v. Lawton, supra, the district may not impose the property tax in question without voter approval.

It is the opinion of this office that the Clark County Nursing Home District may not impose the property tax in question without voter approval.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

October 29, 1987

OPINION LETTER NO. 198-87

The Honorable Roy D. Blunt  
Missouri Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

FILED  
198

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

Shall Article IV Sections 47(a), 47(b) and 47(c) of the Missouri Constitution be amended to extend for ten years the sales and use tax of one-tenth of one percent with such tax revenues being used for soil and water conservation and state parks and further amended to require those tax revenues be spent and used pursuant to certain purposes as defined by state law?

See our Opinion Letter No. 195-87.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,

WILLIAM L. WEBSTER  
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

65102

P. O. Box 899  
(314) 751-3321

November 9, 1987

OPINION LETTER NO. 199-87

Gordon Rolla Upchurch  
Franklin County Prosecuting Attorney  
414 East Main Street  
Union, Missouri 63084

FILED  
199

Dear Mr. Upchurch:

This opinion letter is in response to your question concerning Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bills Nos. 65, 133, 178, 216 & 231, 84th General Assembly, First Regular Session, which relates to the compensation of county officials. The question you posed is as follows:

In regard to the meeting of a "Salary Commission" under Senate Bill 65, Section 7, Subsections 5, 6 & 7, if the "Salary Commission" does meet and adjourn after September 28, 1987 and before November 30, 1987 (which we did here in Franklin County), can a second meeting be called before October, 1989?

Subsection 2 of Section 7 of the bill provides:

2. The clerk of the circuit court of the judicial circuit in which such county is located shall serve as temporary chairman of the salary commission until the members of the commission elect a chairman from their number. The circuit clerk shall give notice of the time and place of any meeting of the salary commission. Such notice shall be published in a newspaper of general circulation in such county at least ten days prior to such meeting. Such notice shall contain a general description

Gordon Rolla Upchurch

of the business to be discussed at such meeting.

Subsection 5 of Section 7 of the bill provides:

In every county the salary commission shall meet before November 30, 1987, and every second year thereafter. At any meeting of the salary commission, the members shall elect a chairman from their number. The county clerk shall present a report on the financial condition of the county to the commission once the chairman is so elected, and shall keep the minutes of the meeting.

Subsection 6 of Section 7 of the bill provides:

At its meeting in 1987, the salary commission shall determine the compensation to be paid to every county officer holding office on January 1, 1988. At any meeting in following years, the salary commission shall determine the compensation to be paid to every county officer until the next meeting of the salary commission.

Subsection 8 of Section 7 of the bill provides:

The salary commission shall issue not later than December fifteenth, a report of compensation to be paid to each officer.

In interpreting a statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administration Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). Subsection 5 of Section 7 of the bill specifically provides that the salary commission shall meet before November 30, 1987, and every second year thereafter. Subsection 8 provides the salary commission shall issue a report of the compensation to be paid each officer by December 15. The bill does not specifically provide whether a commission having met once after September 28, 1987 but before November 30, 1987 can meet a second time before November 30, 1987.

"Unless restrained by charter or statute applicable, the legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and

Gordon Rolla Upchurch

reconsider its vote upon measures before it, at its own pleasure, and to do and undo, consider and reconsider, as often as it may think proper, until by final vote or act, accepted as such by the body, a conclusion is reached. It is the result only which is important." McQuillin, Mun Corp § 13.48 (3rd Ed.). "It is a general rule, subject to certain qualifications hereinafter noted, that a municipal council has the right to reconsider its actions and adopt an ordinance or measure that has previously been defeated, or rescind one that has previously been adopted, at any time before the rights of third parties have vested." 56 Am Jur 2d, Municipal Corporations, Etc. § 167. It therefore appears that the salary commission can meet and consider and reconsider, as often as it chooses, up until November 30, 1987, the decision regarding the establishment of the compensation of county officers.

Further support for our conclusion is found in Aurora Water Co. v. City of Aurora, 31 S.W. 946 (Mo. 1895). In discussing the authority of a city of the fourth class to hold a special meeting, the Missouri Supreme Court stated:

It is insisted that it is invalid because passed at an unauthorized meeting of the board, in that it was not a regular meeting, and that the statutes, while giving to cities of the first, second, and possibly the third, class, power to call special meetings, yet that no such power is conferred by statute on cities of the fourth class. It may be granted that no such power is expressly conferred, yet it does not thence follow that such power is nonexistent. Of necessity, cities possess many powers which are not enumerated in the grant of power, and yet pass as the mere incidents and auxiliaries of those expressly granted. Id. at 954.

Just as in the case cited, the fourth class city was deemed to have the power to hold a special meeting; likewise, the county salary commission has the power to hold a second meeting prior to November 30, 1987.

Having concluded that the salary commission can meet more than once prior to November 30, 1987, a related issue is the method of calling subsequent meetings of the salary commission. Under subsection 2 of Section 7, the circuit clerk can call subsequent meetings if that person so chooses. At the first meeting of the salary commission after September 28, 1987, we

Gordon Rolla Upchurch

presume that a chairman was elected from the members of the salary commission pursuant to subsection 5 of Section 7. We believe it is incidental to the authority of a chairman so elected to also, if he so chooses, call subsequent meetings of the salary commission.

In summary, it is the opinion of this office that a second meeting of the salary commission in Franklin County may be held before November 30, 1987.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General

BALLOTS:  
COUNTIES:  
COUNTY ELECTIONS:  
COUNTY HOSPITAL:  
ELECTION BALLOTS:  
ELECTIONS:

The Boone County Commission is not authorized to call a nonbinding preference election on the sale or lease of Boone County Hospital.

December 4, 1987

OPINION NO. 204-87

The Honorable Ken Jacob  
Representative, District 25  
State Capitol Building, Room 110-B  
Jefferson City, Missouri 65101



Dear Representative Jacob:

This opinion is in response to your question asking:

Can the Boone County Commission call a nonbinding preference election on the sale or lease of the Boone County Hospital?

Enclosed herein is a copy of Missouri Attorney General Opinion Letter No. 111, Harper, 1978, and a copy of Missouri Attorney General Opinion No. 478, Weier, 1969. As discussed in these opinions, the county commission can only place a proposition on the ballot when so authorized by law. A review of the applicable statutes does not reveal any law authorizing the Boone County Commission to call a nonbinding preference election on the sale or lease of the Boone County Hospital at this time.

We note that Section 205.354, RSMo 1986, authorized an election on a similar question at the primary or general election day in 1986. Such section provides:

205.354. Sale of county hospitals, certain second class counties -- election procedure -- ballot form (Boone County).  
-- 1. The county commission of any second class county having a population of at least one hundred thousand and which operates a county hospital may call a nonbinding preference election to determine the wishes of the voters of the county as to whether the county hospital is to be sold. If called by the commission, the

The Honorable Ken Jacob

election shall be held on the primary or general election day in 1986.

2. The election shall be conducted by the election authority of the county in the same manner and in all other respects as in elections for state and county offices. The results of the election shall be certified by the county commission. The costs of the election shall be paid and notice shall be given as otherwise provided by law.

3. The proposition shall be submitted in the following form:

Shall the county commission sell the county hospital?

- [ ] Yes  
[ ] No

(Emphasis added.) Where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. State ex rel. State Highway Commission v. County of Camden, 394 S.W.2d 71 (Mo.App. 1965). The fact that the legislature specifically authorized an election as described in Section 205.354 in 1986 would indicate that an election such as that described in your question cannot be held in 1987 or subsequent years.

#### CONCLUSION

It is the opinion of this office that the Boone County Commission is not authorized to call a nonbinding preference election on the sale or lease of Boone County Hospital.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General



## ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER  
ATTORNEY GENERAL

JEFFERSON CITY  
65102

P. O. Box 899  
(314) 751-3321

December 22, 1987

OPINION LETTER NO. 214-87

The Honorable George K. Hoblitzelle  
Representative, District 86  
35 Glen Eagles Drive  
St. Louis, Missouri 63124

214

Dear Representative Hoblitzelle:

This opinion letter is in response to your question asking:

Whether Article VI, Section 30 of the Missouri Constitution requires the Board of Freeholders to present the plan as one issue on the ballot; or

Whether Article VI, Section 30 of the Missouri Constitution permits the Board of Freeholders to present the plan as more than one issue on the ballot.

Since there are no court opinions interpreting the above-referenced constitutional section on this issue, this office's opinion must be based on a reading of the text of the constitutional section in light of the principles for interpreting constitutional provisions as set down by our Supreme Court.

Rules employed in construction of constitutional provisions are the same as those employed in construction of statutes, but the former are to be given a broader construction due to their more permanent character. . . . Crucial words must be viewed in context and it must be assumed that words used were not intended to be meaningless. . . . This Court has recognized that in construction of constitutional provisions, it should undertake to ascribe to words the meaning which the people understood them to have when they

The Honorable George K. Hoblitzelle

adopted the provision. . . . "The framers of the Constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language." . . . The meaning of the words in the provision, as conveyed to the voters, is presumed to be their natural and ordinary meaning. . . . The ordinary, and commonly understood meaning is derived from the dictionary. . . . Moreover, the grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed. . . . Of course, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole.

[Citations omitted.] Roberts v. McNary,  
636 S.W.2d 332, 335 (Mo. banc 1982).

A reading of both subsections (a) and (b) of Section 30 of Article VI, Missouri Constitution (as amended 1966) in light of the above principles demonstrates that it is a single plan to be approved or rejected in toto which is to be submitted to the voters. The following underlined portions of the constitutional text demonstrate the basis of this conclusion:

Section 30(a). Powers conferred with respect to intergovernmental relations -- procedure for selection of board of freeholders. The people of the city of St. Louis and the people of the county of St. Louis shall have power . . . or, (5) to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county. The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. . . .

The Honorable George K. Hoblitzelle

Section 30(b). Appointment of member by governor -- meetings of board -- vacancies -- compensation and reimbursement of members -- preparation of plan -- taxation of real estate affected -- submission at special elections -- effect of adoption -- certification and recordation -- judicial notice. . . . The board shall prepare and propose a plan for the execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder. . . . The plan shall be signed in duplicate by the board or a majority thereof, and one copy shall be returned to the officials having general charge of elections in the city, and the other to such officials in the county, within one year after the appointment of the board. Said election officials shall cause separate elections to be held in the city and county, on the day fixed by the freeholders, at which the plan shall be submitted to the qualified voters of the city and county separately. The elections shall not be less than ninety days after the filing of the plan with said officials, and not on or within seventy days of any state or county primary or general election day in the city or county. The plan shall provide for the assessment and taxation of real estate in accordance with the use to which it is being put at the time of the assessment, whether agricultural, industrial or other use, giving due regard to the other provisions of this constitution. If a majority of the qualified electors of the city voting thereon, and a majority of the qualified electors of the county voting thereon at the separate elections shall vote for the plan, then, at such time as shall be prescribed therein, the same shall become the organic law of the territory therein defined, and shall take the place of and supersede all laws, charter provisions and ordinances inconsistent therewith relating to said territory. If the plan be adopted, copies thereof, certified to by said election officials of the city and county, shall be deposited in

The Honorable George K. Hoblitzelle

the office of the secretary of state and recorded in the office of the recorder of deeds for the city, and in the office of the recorder of deeds of the present county, and the courts of this state shall take judicial notice thereof.

(Emphasis added.)

Not only is the board's proposal and the ballot submission always spoken of in the singular ("a plan" or "the plan"), but also the Constitution explicitly requires that the proposed "plan" shall provide for "the adjustment of all matters and issues arising thereunder." (Emphasis added.) Section 30(b) of Article VI, Missouri Constitution. Furthermore, when approved, it is "the plan" (not a part thereof) which "shall become the organic law of the territory therein defined, . . . ." *Id.* The "natural and ordinary meaning" which would be "commonly understood" from the wording of Section 30 of Article VI is that there is to be one plan to be approved or rejected in toto.

Therefore, it is the opinion of this office that Article VI, Section 30, Missouri Constitution (as amended 1966) requires the board of freeholders to present a plan as one issue on the ballot.

Very truly yours,

*William L. Webster*  
WILLIAM L. WEBSTER  
Attorney General